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Nos. 25 & 52

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IN THE

Supreme Court of the United States

October Term, 1969

No. 25

FREDERICK T. ZUBER, *et al.*,

Petitioners,

v.

RUSSELL ALLEN, *et al.*,

Respondents.

No. 52

CLIFFORD M. HARDIN, Secretary of Agriculture,

Petitioner,

v.

RUSSELL ALLEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS RUSSELL ALLEN, *ET AL.*,

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NOTE

Respondents apologize for the length of this breif but are are of the respectful view that the court may be assisted thereby because of the nature of the case. Additionally, respondents have had to respond to breifs of the petitioners totalling 168 pages, plus 174 extensive footnotes and 34 page appendix, and lengthy reply breifs will also be filed by petitioners.

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BRIEF OF RESPONDENTS RUSSELL ALLEN, *ET AL.*, IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 402 F.2d 660. The findings and conclusions of the District Court and its judgment (A. 120-21) are not reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioners' briefs.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601, *et seq.*), the Secretary of Agriculture was authorized to include in the Massachusetts-Rhode Island milk order of October 1, 1964, a nearby

farm location differential provision, 7 C.F.R. 1001.72, under which producers whose farms are located in either of two designated "nearby" areas are entitled to receive a differential payment which varies the uniform price required under Sec. 8c(5)(B)(ii) in recognition of (1) the use made of nearby producers' milk or (2) the allegedly higher prices received by nearby producers prior to Federal regulation, the aforesaid section providing that all producers are to receive a uniform price for all of their milk irrespective of the use thereof.

2. Whether the nearby differential provision promulgated on October 1, 1964, is an authorized adjustment to the uniform price, either under Sec. 8c(5)(B)(ii)(c) concerning "the locations at which delivery of such milk is made", or under (a) relating to "market * * * differentials customarily applied by the *handlers*", when such payments are made by "non-nearby" dairy farmers regularly supplying the fluid milk market to other producers whose farms are located in certain designated "nearby" areas, and when the "nearby" producers are already compensated for any location value of their milk under the zone differential of the milk order, 7 C.F.R. 1001.62, which includes an additional payment over the uniform price and includes (1) the authorized market differential for direct delivery of milk to a city plant or market; (2) the transportation differential paid for milk delivered progressively closer to the primary market; and (3) the higher transportation rates paid within the "nearby" zone as contrasted with the rates for each 10-mile zone in the balance of the milkshed.

3. Whether the nearby differential violates Sec. 8c(5)(D) or (G) of the Act.

4. Whether the nearby differential interferes with the free flow of trade between states and burdens interstate commerce in violation of the Constitution.

5. Whether the operation of the nearby differential is illegally discriminatory and violative of constitutional rights to due process and equal protection of law.

6. Whether the Secretary's findings were deficient, inconsistent and unsupported by valid and substantial evidence, and his conclusions and decisions irrational, inconsistent and arbitrary.

STATUTE INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, particularly Section 608c(5) thereof.

The regulation involved is the Federal Order regulating the handling of milk in the Massachusetts-Rhode Island marketing area, 7 C.F.R. 1001 *et seq.*, particularly 1001.72 thereof, promulgated in 1964.

COUNTERSTATEMENT OF THE CASE

1. NATURE OF THE CASE

The respondents, hereafter referred to as the "non-nearby" dairy farmers, brought this action against the Secretary of Agriculture in the United States District Court for the District of Columbia on December 27, 1966, and their complaint requested a judgment declaring the invalidity of the nearby farm location differential provision of the Massachusetts-Rhode Island federal milk order, 7 C.F.R. 1001.72, as well as an injunction against the future enforcement of such provision by the Secretary.

The Massachusetts-Rhode Island milk order is one of approximately 75 federal orders which regulate the handling of milk in the various regional milk marketing areas throughout the United States. It was promulgated by the

Secretary effective October 1, 1964, pursuant to the Agricultural Marketing Agreement Act of 1937, as amended 7 U.S.C. 601 *et seq.*, 50 Stat. 246, after extensive administrative hearings. The order consolidated the federal milk Orders that regulated the handling of milk in the Greater Boston, Worcester, Springfield, and Southeastern milk marketing areas, the latter milk order having encompassed the entire State of Rhode Island and a substantial part of southeastern Massachusetts.

The Secretary's decision in respect to the issuance of the consolidated Order and the contested nearby farm location differential provision is found at 29 Federal Register 11205, dated August 4, 1964, and the pertinent parts thereof are set forth in the joint appendix commencing at page 346. Relevant excerpts from the decisions promulgating the Southeastern New England milk order, 23 Fed. Reg. 8225, October 24, 1958, and the Springfield and Worcester federal orders, 14 Fed. Reg. 7085, 7097, November 23, 1949, are reproduced at pages 331-46 of the joint appendix. The findings of the Secretary in issuing the first order regulating the handling of milk in the Greater Boston marketing area, effective February 9, 1936, are found in the order itself, this also being true in respect to the Boston order issued on August 1, 1937, which contained the first nearby farm location differential provision. Relevant portions of the 1936 and 1937 Boston orders are set forth at pages 223 and 248 of the joint appendix, and pertinent excerpts from the economic briefs submitted by the Department of Agriculture at the administrative hearings for the Boston orders are found at pages 247 and 669 of the appendix.

The nearby farm location differential provision of the 1964 Massachusetts-Rhode Island milk marketing order, 7 C.F.R. 1001.72(a), provides that producers whose farms are located in Rhode Island, in all of that part of Connecticut east of the Connecticut River and the towns of

Granby and Suffield, and in certain enumerated towns, cities and counties in specified New England states, primarily Massachusetts, shall receive a differential payment of 46 cents per hundredweight for their milk over and above the "uniform" price received by all producers, unless the addition of 46 cents gives a result greater than the Class I or fluid milk price at the plant at which the milk is received, in which event there shall be added a rate which will produce that price. Subsection (b) of the nearby farm location differential provision provides for the payment of 23 cents per hundredweight or such lesser sum as will equal the Class I or fluid use price at the plant where the milk is received from producers whose farms are located in other enumerated cities and towns in specified New England states.

Only small portions of the States of Maine, New Hampshire, and Vermont are included in the preferential areas enumerated in the Order provisions, and the great bulk of the producers in those States are thus classified as "nonnearby" or ineligible producers by the Secretary's action. All but 57 of the approximately 4,136 Vermont dairymen regularly supplying the Massachusetts-Rhode Island marketing area in 1968 were required to sustain a reduction in their uniform minimum price because of the existence and operation of the farm location differential provision. The loss to Vermont dairymen alone amounts to about $2 million per year, and the total loss to all of the approximately 6,600 non-nearby dairy farmers is at least $3 million annually. Non-nearby dairy farmers regularly supply about 75 percent of the milk for the marketing area, the State of Vermont furnishing one-half of the milk supply (A. 74).

The monies to pay the differentials to some 2,100 nearby producers are deducted from the marketwide equalization pool prior to the computation and announcement of the monthly uniform minimum milk price by the

Market Administrator. Such deduction necessarily reduces in corresponding amount the monies in the marketwide equalization pool belonging in equity to all producers regularly supplying the market, and the payment of the nearby differentials to the nearby producers by the Secretary admittedly constitutes a diversion of a part of the uniform minimum price that non-nearby producers would otherwise received for their milk (A. 350). The mechanics and operation of the marketwide equalization pool and the relevant provisions of the Order are described more fully in a subsequent part of this brief. (See A. 669-73).

The unusual differential provision presently exists in only the Connecticut federal order out of approximately 75 such orders in the United States. Interestingly, the Connecticut milk order is also the only federal order wherein the marketing area is specifically defined by the borders of a State. The Connecticut federal order and nearby farm location differential provision, 7 C.F.R. 1015.72, were promulgated by the Secretary effective February 9, 1959, and his relevant decisions are found at 24 Fed. Reg. 1049, dated February 9, 1959, and at 25 Fed. Reg. 1063, dated August 16, 16, 1960. The Connecticut nearby differential provision, 7 C.F.R. 1015.72 (a) provides for the payment of a differential of 46 cents per cwt. over the "uniform" price to producers whose farms are located in Connecticut, Rhode Island, part of Massachusetts, and a very limited part of New York State. Producers whose farms are located in another small part of New York State or within a portion of Berkshire County, Massachusetts, are to be paid 23 cents per cwt. over the uniform price. As of 1967, there were only 89 non-nearby producers authorized as regular suppliers of the Connecticut area, although approximately fifty percent of its fluid milk supply must be obtained from outside

of the State.[1] These non-nearby producers were forced to pay 46 cents per cwt. to Connecticut producers in order to market their needed milk in the deficit Connecticut market. However, the operation of the Connecticut nearby differential provision returns but about 2 cents per cwt. to approximately 1,800 "nearby" producers.[2] The 90 nearby producers in the intermediate 23-cents areas actually sustain a *loss* of about 17 cents per cwt. instead of the required gain of 23 cents because there are so few non-nearby producers to make the differential payments.[3] In other words, elimination of the Connecticut nearby differentials would result in gain of 44 cents per cwt. to the non-nearby producers, a gain of 17 cents to the nearby producers in the 23-cents areas, and a loss of 2 cents per cwt. to the producers in the 46-cents areas. (A. 431-32; See also, 25 Fed. Reg. 7834, August 16, 1960). Many of the non-nearby producers lose $5,000 - $6,000 annually under the Connecticut nearby differential provision although the average gain to the Connecticut nearby producer is only about $12.50 per month.

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[1] Much of the milk is obtained by methods which do not accord the suppliers thereof a status as regular producers. See 24 Fed. Reg. 1049-50 and Report of the Federal Milk Order Study Committee, transmitted to the Secretary of Agriculture March 16, 1962, pp. 64-76, also set forth at pp. 24e-29e of appendix of respondents' brief in opposition to brief *amicus curiae* of the State of Connecticut filed in connection with petitions for certiorari.

[2] Although the opinion and findings of fact in *Cranston v. Freeman,* (D.C.N.Y.) 290 F. Supp. 785 (1968), states that there are 3,000 "nearby" producers under the Connecticut Order, the record of that suit discloses that the government advised there were only 1,800 (*Cranston* record 1163, pp. 161-163).

[3] Finding of Fact No. 8 in *Cranston v. Freeman, supra,* states that "The challenged order provision *results* in producers whose farms are located in two specified geographical areas *receiving* a

(cont'd)

Additionally, the Connecticut, Rhode Island, and Massachusetts producers, with minor exceptions, receive the nearby differential payments from the respondents' uniform milk price for every hundredweight of milk that they market under the Massachusetts-Rhode Island Order, and the respondents are also required to again pay a 46-cents nearby differential to the same "nearby" producers, with said minor exceptions, under the Connecticut Order whenever the respondents' milk is needed in Connecticut. Also, the dumping of unneeded Connecticut milk in the Massachusetts-Rhode Island market lowers the uniform price of milk in this market by contributing to its surplus of milk, the said marketings simultaneously raising the uniform price in Connecticut by virtue of the lowering of surplus in that market. Many of the relevant findings in the Secretary's 1964 decision pertain to both the Massachusetts-Rhode Island and the Connecticut milk orders, and reference is therefore made herein to the Connecticut Order wherever appropriate.

The 1964 Order has not been in existence "for over 30 years" as petitioners repeatedly allege, but the 1937 Boston Order which was consolidated into the present Order did contain a differential payable by about 20,000 producers to only 5% of those serving the market. The cost as recently as 1962 was 3 cents per cwt. but has increased 400 percent under the consolidated Order. (A. 633, 648).

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3 (cont'd) differential over and above the uniform price for milk of 46¢ and 23¢ per hundredweight, respectively, for their milk which is priced under the Order depending upon the designated area in which their farms are located." This finding appears to ignore the fact that such nearby producers actually sustain a gain of 2¢ and a loss of 17¢, respectively, and that the latter *nearby* producers are included by consent of the parties in the plaintiffs' "class" of non-nearby producers, such fact hardly concealing the irrationality of the Connecticut nearby differential any more than if the intermediate "nearby" producers had been included in the class of the nearby producers in the 46¢ areas.

The respondents here briefly note that Section 8c(5)(B)(ii) of the Agricultural Marketing Agreement Act of 1937 provides for the marketwide pooling of milk and for the payment of uniform prices to all producers for all milk delivered to all handlers, irrespective of the use made of their particular milk by the handler to whom it was delivered, such uniform price being subject only to a few adjustments enumerated in the Act and specifically defined in the Congressional Reports pertaining to the Act. Before examining the purpose, policy and various relevant provisions of the Act, it appears that a consideration of the events and conditions leading up to the Act would be both appropriate and helpful.

2. THE BACKGROUND OF THE LEGISLATION

Initially it should be noted that there are certain problems inherent in the production and marketing of milk that necessitated the passage of State and Federal legislation for the regulation of the dairy industry. Milk is a highly perishable product which does not lend itself to leisurely bargaining on an offer and acceptance basis. It is a fertile field for bacteria and considerable investment is required by all dairy farmers for the purchase of equipment and the maintenance of sanitary health standards in a fluid milk market. Cows give more milk from April through August than they do in the remaining months of the year but the size of the herd must be maintained the entire year in order that sufficient milk is available in the period of shorter supply, the variance in production thus creating a surplus of milk in the flush season of the year. The consumer demand for milk is rather constant the entire year but a reserve milk supply of approximately 20 percent to meet daily fluctuations and unexpected contingencies in demand for fluid milk is also necessary. The maintenance of such necessary reserve during the short-production season naturally results in a much

greater surplus of milk during the flush production season.

The surplus of milk not used for fluid or drinking purposes is not discarded as a total loss by the handler but is manufactured into such dairy products as cheese, butter, ice cream, powdered milk and other less perishable products. These milk products, often referred to as surplus as manufactured milk, must compete in the marketplace with other like products from distant lower-cost production areas of the country, due to the very fact of their non-perishability, and they consequently return a smaller margin of profit to the handler than the higher-priced fluid milk.[4]

Moreover, even prior to the passage of the Agricultural Adjustment Act of 1933, the surplus milk in the Boston milkshed and other fluid markets was produced under the same sanitary health standards as that of milk used for fluid purposes and was thus actually in competition with the fluid milk.[5] (A. 669). This fact and the entry of cream and other dairy products into the Boston market from distant areas of the country had a natural depressant effect on the prices received by dairy farmers for their fluid milk.

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[4] "Creamery-butter production in New England declined from 21,087,000 pounds in 1921 to only 3,889,000 pounds in 1933... In these areas there was a shift from the production of milk for manufactured dairy products to the production of milk for use in fluid form." USDA: *Agricultural Adjustment in 1934: A Report of Administratiion of the AAA* (GPO 1935).

[5] Economic Brief of USDA, filed in administrative hearing record of Greater Boston milk order issued August 1, 1937. Much of the explanatory and factual material presented in the above

(cont'd)

The problems engendered for the dairy farmer by these biological and competitive factors were compounded by the operation of the basic laws of economics in respect to the excess of supply over demand in a free and unregulated market and by the ready inclination of most handlers to take full advantage of the situation. Consequently, many dairy farmers banded together as a matter of economic self-preservation,[6] and they sought to control the supply of milk in their locality in order to bargain with the handler for fairer prices. The success of any such cooperative effort necessarily rested upon a uniform price treatment of those dairymen associating together for their common welfare.

Some associations contracted with the handler for the payment of a flat price for all of the milk that the membership agreed to furnish to the handler during a particular period, a plan that assured uniformity of price for the producer and one that worked fairly well in those

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[5] (cont'd) Statement of the Case is reflected in the Economic Brief of the USDA, set forth at pages 669-73 of the Joint Appendix, part of which is a portion of the original record filed in this Court, and its importance is underscored by the fact that petitioners have arbitrarily placed it in at the end of the appendix with other important material harmful to their position.

[6] The cooperative form of organization had come into wide use in the butter and cheese industries long before the fluid milk cooperatives assumed importance in the 1920's. They are of two general types, bargaining cooperatives and operating cooperatives, and the primary function of the former is to negotiate terms of sale for the production of their producer members. The operating cooperatives actually receive and dispose of the milk and manufacture butter, cheese or other by-products from the surplus. In actual practice, each type of cooperative performs some of the functions of the other in a great number of instances. Benedict & Stine, *The Agricultural Commodity Programs* (1956), p. 442.

areas where the amount of production and the use of milk was generally predictable by both the cooperative association and the handler. However, the flat price plan was far from satisfactory in the many instances where the handler's actual use of the milk varied from that originally contemplated, and this pricing arrangement obviously contributed to market instability and disorderly marketing under such circumstances.

The most acceptable plan to producers in most areas, evolved by cooperative associations in England, provided for the classification of milk according to its use by the handler as either fluid milk or cream and manufactured milk products.[7] This plan sought to recognize the relationship of price to the actual use of the milk by the handler in providing for different prices for each use classification of milk.

In addition to assuring that the handler paid his producers in accordance with the use value of the milk to the handler, the classified price plan also sought to assure each dairy farmer of uniform price treatment by reason of the fact that he was not to be paid according to the use made of his particular milk. Previously, the handler had been able to pay his producers a milk price reflective of the surplus conditions in the milkshed or he could pay a higher price to a portion of his producers because of the use of their particular milk for fluid purposes. However, such price preferences naturally resulted in discontent and unrest among the other producers whose

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[7] In some markets there were only two classifications of milk, Class I for fluid or drinking milk and Class II for cream and manufactured milk products. Some markets place cream in an intermediate position and assign manufactured milk products to Class II or differentiate even more extensively in respect to the classification of by-products of milk.

milk was produced for the same purpose, and the variances in prices had precipitated a self-defeating competition that only served to lower the price for all producers.

The classified price plan contemplated the payment of a composite or blend price to each producer for every hundredweight of milk delivered to his handler, irrespective of the use made of his particular milk, such composite or blend price resulting from the average use made by the handler of all of the milk of his producers disposed of by him at the respective classified prices.[8] As explained in the Economic Brief (A. 669-73) of the USDA, pp. 82-84, filed in the administrative hearing record for the 1937 Greater Boston milk order:

> "Equalization of fluid milk sales is simply an extension of a plan that has been employed by each handler and each cooperative creamery. If a creamery sold 75% of its milk as whole milk and the remainder as cream, it did not pay 75% of its producers the fluid milk price for all their milk and the remaining 25% the cream price for all their milk. Such a method obviously would have been inequitable. Instead each producer was paid the whole milk price for 75% of his deliveries and the cream price for the remaining 25%. * * *."

At least in theory, the classified price plan obviously possessed a number of advantages over prior arrangements, such as uniformity of price to the producer without regard to the use of his particular milk, payment by the handler according to the use value of the milk disposed of by him, the setting of a price for fluid milk high enough to induce production in the period of lowest production,

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[8] Such an arrangement is known as a handler pool or individual handler pooling of milk.

the guarantee of an adequate supply of milk by virtue of the handler's receipt of all milk offered by the producers, and other like factors that promised better conditions for the producers.

However, the classified price plan in operation also was subject to certain flaws that precluded market stability, the major defects relating to a persistent variance in prices to producers, the lack of marketwide control in a multi-handler milkshed, and the absence of any effective method to investigate underpayments and enforce the payment of the classified prices by all handlers. Of some significance is the additional fact that numerous sub-plans for the distribution of the monies by the associations to their members existed in the milkshed. In some instances, various associations blended the monies received for their members' milk from all of the dealers served by the association in order to pay all of its members the same basic price. Some assigned a "base" to each member which required that he deliver a certain amount of milk, based usually upon his past deliveries over a particular period, and he received a blended price only for his base milk. Other associations returned the Class I or fluid milk price for the base milk of its members, and all milk delivered above the base received a surplus or Class II price. Some associations deducted penalties from the milk checks of members for failure to deliver as much milk as specified in their base. The evident inequities and confusion attendant to such varying plans and prices and the resultant need for marketwide uniformity was recognized by the USDA representative (A. 235) at the hearings of December 10-12, 1935, for the Boston Order of February 9, 1936:

> "You see, the idea of the whole thing is to work out and finally get on to a uniform rating plan that applies generally throughout the milkshed. * * * At the present time many different

systems obtain. There are rating plans in effect under which farmers are paid, and many farmers in other groups at the present time receive payment on what is called a composite price basis, that is, no rating. It is true that there is a rating plan in the market by which the proceeds are allotted among different groups, but each of these groups takes proceeds allotted to it by the farmer plan, and distributes it in its own way, and the result is that it is very difficult for your farmers to determine whether you, as an individual and a member of one group, are paid equitably in comparison with some other farmer as a member of some other group, because your bases of payment are somewhat, and often very different. So it seems as if, as we proceed in our efforts to work out a general marketing scheme in the market, we should give a lot of attention to some plan that will at least gradually bring the procedure of dividing up the Class I market among producers on a uniform plan."

Moreover, as the foregoing testimony indicates, there was still another side to the coin in respect to the varying prices received by producers when the milkshed lacked marketwide control and uniformity of price. A handler's ability to pay his producers a favorable composite or blend price, as compared with the price of his competitors, depended largely upon his market outlet and his not having so great a volume of surplus sales as his competitors. Under normal conditions in the Eastern markets in the 1930's, fluid milk prices averaged approximately twice as high as the prices paid for milk used as cream.[9] Nevertheless, the milk used as cream was of the

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[9] A. 669. "It was demonstrated that whenever any significant excess of milk was produced for the fluid market, prices would fall to the level of manufacturing milk prices * * *.

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same quality as the milk used for fluid milk and could at any time be sold as fluid milk in competition with it. Quite predictably, a number of handlers with fluid outlets found it to their advantage to purchase the surplus milk of another handler's producers at slightly above the composite or blend price for disposition as fluid milk at the Class I or fluid price. The greater the margin between the fluid and surplus prices, the greater the incentive for such practices by independent handlers and the more unstable the market. Many producers, attracted by a price higher than the composite or blend price paid by their own handler, further contributed to market instability by increasing their production and the market surplus.

Other handlers lowered their price for fluid milk in order to capture a larger share of the fluid milk market. If, by cutting prices, a group succeeded in selling a larger percentage of its milk as fluid milk, its composite or blend price would be higher than that of another handler and group that received the full market price for their fluid sales but carried a larger percentage of the surplus. Thus it was that a handler could cut the price of fluid milk in the city market and still pay a blend price to his producers, as high or even higher than that of his competitors who did not cut prices. If the price-cutting handler did make full payment to his producers, the higher blend price received by them would usually attract other producers serving a different handler much in the same manner as producers were attracted to a handler who normally disposed of most of his milk at the higher priced fluid use. In most instances, however, the price-cutting handler probably would continue to pay his producers approximately the same net price as other competing handlers in

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9 (cont'd) In the absence of regulation, the maintenance of a necessary reserve of milk above Class I requirements has a depressing effect upon the prices for all uses of milk, including producer returns, and an unstabilizing effect upon the marketing of milk in the area." 28 Fed. Reg. 11956.

the territory and pocket the increased return. Obviously, if the handler originally and consistently had a low volume of fluid sales, there was no way that he could meet the prevailing blend price of other handlers in the area, and the classified price system simply resulted in the slow death of such handlers and the lack of any market for some of his producers.[10]

Normally, the price-cutting handler and his group of producers would have increased their share of fluid milk sales only at the expense of another group in the market, and this second group would bear the transferred increase in surplus and resulting lower price. More likely, in order to retain its fluid milk sales and maintain its price to producers, the second group, as well as others similarly threatened, would lower its own price. Eventually, before the cut-price group succeeded in selling its surplus milk at a cut price, it might have had to offer it to several customers and thereby have forced down the price on fluid milk sales of several times the volume of milk which it had to offer. This type of self-defeating competition among groups of producers and handlers reduced the net return to all producers in the Boston milkshed much below a fair price.

Some handlers, particularly the smaller dealers served by local producers near the large metropolitan areas, flaty refused to bear their share of the market's surplus. Since they disposed of virtually all of their milk for fluid purposes by accepting only what was necessary to meet such needs, preferring to purchase on an "emergency"

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[10] *Hood & Sons v. United States,* 26 F. Supp. 672, *affirmed,* 307 U.S. 588.

basis when more fluid milk was required, they were naturally able to return a higher price to their producers if they chose to do so, even when they had disposed of their milk at less than the full fluid milk price. Their producers maintained that they were not "contributing" to the surplus of the market under such circumstances and that the necessary surplus of the market should not be reflected in their milk price. The injurious effect of such market practices by the smaller dealers was noted in *United States v. H.P. Hood & Sons*, 26 F. Supp. 672, *affirmed*, 307 U.S. 525, and in the report of the Pitcher Committee, a special joint legislative committee appointed by the New York State Legislature to study the demoralized price structure of the dairy industry, which stated in part as follows in its report of March 10, 1932:

> "The fact that the larger distributors find it necessary to carry large quantities of surplus while the smaller distributors do not, leads to price-cutting and other forms of destructive competition, especially when the surplus is abnormally large. The small distributors can contract for his minimum requirements and depend upon emergency purchases when threatened with a shortage. The larger distributors can not do this since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice. The result of this situation is that the smaller distributors who take no responsibility for the surplus, by purchasing their milk on the basis of the blended returns by the larger organizations, are in a position to undersell the larger distributors in the cities."

Some of the smaller dealers also found it to their advantage to pay a premium for the local milk instead of paying the higher railroad transportation rates applicable to less-than-carlot shipments of milk from more distant

production areas when all of the milk was shipped by rail transportation. Additionally, the local milk was sometimes delivered in cans directly by truck to the city plant or market, a service that made it unnecessary for the smaller dealer to maintain a country receiving station where the milk is cooled, weighed, etc., prior to shipment to the city plant or market. Such direct-delivery of milk also eliminated the double handling costs of the larger handlers who found it necessary to maintain country receiving stations in the areas where the great bulk of the market's fluid milk was produced. Although the factor of direct-delivery of milk is still a service warranting an extra payment therefor,[11] the increased use of the motor truck and other improvements and technological advances in the early 1930's actually increased the independence of the smaller dealers and created additional price-cutting competition[12] among the market's producers and handlers:

> "The situation was further complicated by the fact that transportation improvements during the last 20 years have continuously widened the area from which fluid milk and cream can be profitably shipped to market. The natural protection formerly enjoyed by producers in the vicinity of the large industrial cities of the East has been greatly decreased not only through the development of railroad tank cars for shipping milk and cream, but particularly by the growing use of the motor-truck. Improvements in roads and in truck-refrigeration methods, including

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[11] 29 Fed. Reg. 11211.

[12] *Nebbia v. New York*, 291 U.S. 502 (1934).

> tank trucks, have greatly increased the distance over which fluid milk and cream may be shipped to market." *Barriers to Internal Trade In Farm Products, A Special Report,* the Secretary of Agriculture USDA (1939), p. 14).

The cost of transporting the milk to market necessarily enters into the price of milk, and the producer's uniform price was always adjusted according to the place where delivery of his milk was made to the handler. The rates for transporting the milk to market from the place of delivery to the handler were naturally related to the primary fluid milk market for which all milk was produced, and the milkshed was consequently broken up into freight zones[13] outward from the Boston "nearby plant" area or zone under the Boston Order in order to apply a graduated transportation adjustment according to the location at which the milk was delivered to the handler. This basic economic principle was followed in promulgating the 1964 consolidated Order:

> "The basing point for computing zone prices under the consolidated order should be Boston. * * * The purpose of establishing zone differentials is to achieve a high degree of *uniformity* in prices to all handlers f.o.b. the market for milk which is received from producers at plants located at varying distances from the principal consumption area. To achieve this purpose, the zone differentials must closely reflect costs generally incurred in receiving milk at country plants and moving such milk to the city plants." (29 Fed. Reg. at 11210, 2nd col., last para.).

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[13] See A. 255 for Boston Order and 29 Fed. Reg. at 11236 for the 1964 Mass.-R.I. zone schedule in effect at time of filing of suit, a number of changes having been made since then. 32 Fed. Reg. 9900. For the Connecticut Zone schedule in 1964, see 29 Fed. Reg. at 11248.

The double *handling* costs involved in receiving the milk at country plants instead of by direct delivery to the city plants has already been mentioned. In view of the fact that fluid milk processing plants were located in cities other than Boston it is evident that the direct delivery of milk to those city plants or markets provided a service to the handlers operating such plants and had no exclusive relationship to the primary fluid market as did the transportation adjustment or freight differential. The premium for such service would normally be the difference between costs in receiving the milk directly at the city plant or market and the cost in receiving the milk at the country plant where the double handling costs would arise. Of course, the amount of any such premium would also depend upon the amount of the milk supply adjacent to the particular secondary city market and the alternative costs involved in obtaining the handler's supply from such source and any country plant that might be in the locality.

One of the most informative decisions by the Secretary concerning such direct-delivery or "customary market differentials" is found at 22 Fed. Reg. 4212-16, dated June 14, 1957, and the Secretary there discusses whether such market differentials should be continued in both the metropolitan area and in the secondary New York State markets as they existed prior to Federal regulation. After continuing the direct-delivery or market differential under Federal regulation in the secondary markets such as Albany, Troy, Schenectady, Syracuse and other Upstate New York secondary markets (22 Fed. Reg. 4216), the Secretary then revoked these customary market differentials in 1963 in the secondary markets and lowered it to but 5 cents per cwt. in the metropolitan area because of decreased handling costs, improved transportation that enabled large amounts to be direct-shipped, alternative supplies

available in secondary markets, and the closing of many country receiving plants.[14]

The improvement in roads and motor transportation in the early 1930's not only virtually eliminated the preferential position of the nearby producer but also wrought other significant changes for the more distant producer that caused further upheaval in the milkshed. Numerous country receiving stations located close to the producers' farms were closed and consolidated into larger plants more distant from the farm where larger volumes of milk could be handled on a more economical basis by the receiving handler. This significance of this development is noted even in the article cited by the petitioners and prepared by H.L. Forest and other experts from both the USDA and the Farm Credit Administration in 1938.[15]

> "Country station costs per unit, as a rule, tend to vary inversely with the volume of milk handled. A recent study of stations in Boston, for example, showed that the per unit costs for stations having a volume of from 2 to 5 million pounds per year were about 70 percent higher than for

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[14] See also 24 Fed. Reg. at 1652-53, February 1, 1964, wherein the Secretary again discusses the direct-delivery differential in refusing to raise the prices received by Upstate New York producers to the level of the "historical (prior to regulation in the Capital District) relationship of prices" to Capital District producers to prices received by other New York-New Jersey producers equi-distant from the Metropolitan District because "the Capital District producers are assured of a protected market by being under a Federal order."

[15] H.L. Forest, E.W. Gaumnitz and O.M. Reed, AAA, and T.G. Stitts and W.C. Weiden, FCA, *Relative Prices To Producers Under Selected Types of Milk Pools,* Farm Credit Admin., Cooperative Division, Bulletin No. 25, June 1938, Page 70.

> stations with 15 to 20 million pounds per year. The stations in the milkshed ranged from less than 2 million to over 5 million pounds per year. Under these conditions a question arises as to how equitable it is to have a uniform country station charge (presumably an average) for the entire area. From the producer's point of view, the answers would seem to depend first upon the nature of the factors contributing to the high volume, whether high volume per shipper, heavy concentration of average-volume shippers, or a larger-than-average local hauling distance from farm to station; and second, on whether differences in these factors justify a difference in costs or charges to producers. *The justification for a lower charge at high-volume plants would seem to be somewhat clearer where the high volume had resulted from closing other stations and forcing a longer and more costly local haul from farm to station platform."*

The aforesaid article also states at page 54 that, "Usually the costs of processing milk are lower in large plants than in small ones,"[16] and further notes at page 38 that, "The Dairymen's League pools the returns from all milk sold for its members and pays a uniform price to all, subject to certain differentials for location, grade, butterfat, and *plant* volume.

These technological advances in consolidating the milk supply, refrigeration, tank trucks and railroad tanks in place of cans, improved highways, and other aids to distribution made the distant milk accessible to even the

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[16] C.R. Tucker, *Costs of Handling Fluid Milk and Cream in Country Plants,* Cornell Univ. Exp. Stat. Bull. 473, (1925); R.W. Bartlett, *Milk Marketing In Pennsylvania – Shipping Station Operations,* Penn State Coll. Agr. Exp. Stat. Bull. 219 (1928).

small dealer. Simultaneously, however, the nearby producers found it much more difficult to enter the retail market because of the increased costs attendant to such improvements, and his bargaining position with handlers in this respect quickly evaporated. Dealers will never pay more for one supply of milk when an alternative supply of equal quality is available at a lower price, and the petitioners acknowledge that many dealers would pit one group of producers against the other in order to break down prices in the entire milkshed. Producers outside the milkshed who bore no responsibility for the shouldering of the surplus in the flush season or the supplying of the needs of the market during the short production months also found it advantageous to sell their milk under such conditions to handlers who utilized the same to beat down local prices within the milkshed.

The depression further aggravated the deteriorating price situation because of the decreased purchasing power of the consumer and his resultant inability to purchase fluid milk at even the lowered prices. The increased surplus of milk was compounded by the desperation reaction of many dairy farmers in overproducing in an attempt to obtain sufficient income to survive. Kickbacks, rebates, refunds, penalties, excessive hauling charges, special deals on classification, quota systems and other similar arrangements with a handler with a high fluid milk utilization were often a prerequisite to the retention of an outlet by the dairy farmer, most of whom were unaware of the prices being received by other producers because of the prevalency of such market practices (A. 690) and the various pricing plans in effect in the milkshed. The competiton of producers for fluid milk outlets became so intense in the early 1930's that milk wars, violence and surplus milk prices were the inevitable result. The situation was seen by most handlers as a golden opportunity to exploit the helpless dairy farmers, their tendencies in this regard being related in many of the early cases.

From 1927 through 1931, prices to dairy farmers fell more than fifty percent, although the handlers were still able to make a net profit on their investment of more than twenty-five percent.[17] The problems of surplus milk, price-cutting, varying milk prices to producers, and cut-throat competition for fluid milk sales could not be solved by the cooperative associations to any appreciable degree because of their inability to control the entire market and effectuate a marketwide pool and their efforts ultimately collapsed completely.

The chaos that ensued prompted the passage of state legislation to deal with the demoralized price conditions that existed in every market, but much of such legislation was marked by a narrow self-interest and a short-sightedness that failed to perceive the necessity for marketwide control and a consideration of the interests of producers in other States.[18] *Hood & Sons v. DuMond,* 336 U.S. 526 (1949). Over 90 percent of the fluid milk for the Boston market was regularly obtained from sources outside of Massachusetts (A. 223, 673, 679), 60 percent of the milk being from the State of Vermont in 1934 (A. 674, 679), and the need for an overall control because

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[17] H.R. Concurrent Resolution No. 32, 73rd Cong., 2nd Sess., May 14, 1934. See also, the Report of the FTC to the Congress, H. Doc. 152, 74th Cong., 1st Sess. (1934), for information on which 1935 Act was enacted.

[18] See *Barriers to Internal Trade In Farm Products, A Special Report to the Secretary of Agriculture by the Bureau of Agriculture Economics, USDA* (GPO, March, 1939). This Report enumerates many barriers and discriminatory obstacles to free trade between the New England States during the early 1930's and gives an excellent documentation and discussion of the situation facing the Congress in 1933 and 1935.

of the interrelationship of the milk supply was noted in *United States v. H.P. Hood & Sons,* 26 F. Supp. at 680, *affirmed* 307 U.S. 588, wherein the Court stated that, "the introduction of as little as 2,000 extra quarts of milk into the marketing area might affect the price of milk within the area * * * as little as a carload of milk would drop the wholesale price in Boston as much as one cent per day. Clearly, then, it cannot be denied that the milk wholly raised, processed, and sold in Massachusetts does not have a direct effect or burden on the marketing of interstate milk."

The same Massachusetts federal court made a similar finding in the related case of *United States v. Whiting Milk Co.,* 21 F. Supp., 321 (1937), wherein it also recognized the public interest aspect of the milk industry:

> "A continuous flow of fresh milk into the Boston area, which includes thirty-seven cities and towns, from rural New England is imperative. From the urban viewpoint, it is a matter of real necessity. From the producer's viewpoint, it provides a dependable market for their product, and is an important source of income to them. Less than 12 per centum of the milk brought into the Boston area originates in Massachusetts, and less than 2 percentum of it is handled exclusively in intrastate commerce. From 1929 to 1933, the prices paid for milk to the producers of New England declined steadily. In 1936, the price paid to producers of Vermont was 34 per cencentum below the 1929 level. Conditions in other states were comparable."

In *Nebbia v. New York,* 291 U.S. 502 (1934), the Supreme Court took notice of the depressed price conditions then prevailing in upholding legislation enacted by the State of New York which provided for minimum prices in the retail sales of milk:

> "During 1932 the prices received by farmers for milk was much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve."

The discriminatory state regulations also pointed up the inability of a state to legally regulate and control the sale of milk pruchased without its borders (344, 332, 336-37), and to provide marketwide supervision and enforcement in respect to the interstate production and handling of milk. *Baldwin v. Seelig,* 294 U.S. 511 (1935). The Congress was forced to meet the disastrous national problem by the enactment of the Agricultural Adjustment Act of 1933, 48 Stat. 31, an act that was long overdue and one which had been forestalled by the general aversion to public participation in economic activities. Consequently, much of the program embodied in the initial legislation was regarded as not only of an emergency measure but also a temporary one that would be supplanted by a normal and uncontrolled economy as soon as the intended recovery of agriculture was effectuated.

3. THE CONGRESSIONAL LEGISLATION AND THE REGULATORY PROGRAM

The 1933 Act authorized the Secretary to enter into marketing agreements with processors, associations of producers, and others engaged in the handling of any agricultural commodity or product in interstate or foreign commerce. Licenses were issued to handlers in conjunction with the approval of a marketing agreement in order to facilitate compliance with the terms and conditions of the agreement, which was primarily concerned with the elimination of

unfair trade practices or excessive charges against farmers.[19] The Secretary could suspend or revoke such licenses and violators were subject to a maximum fine of $1,000 per day for each violation.

The programs formulated in the agreements and licenses by interested parties "usually included some features that were of doubtful legality. Others, though not vulnerable from a legal standpoint, were considered questionable in terms of public policy."[20] The agreements could be expected to include only those features that promised sufficient mutual advantage for the groups submitting the same, and the Act was so vague as to even raise the question whether the agreements and licenses should come under the Agricultural Adjustment Administration or be handled under the industry-wide codes of the NRA. It did not provide usable guides or standards for arriving at prices to be paid and charged for milk, and failed to indicate what practices were "unfair" or what charges would tend to "prevent the effectuation of the declared policy." There was even question as to whether the classified price system could be used.[21]

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19 The 1935 Act, sec. 8c(7)(A), follows the 1933 Act and the terms of the agreements and licenses in respect to agricultural commodities by "(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof."

20 Benedict & Stine, *The Agricultural Commodity Programs* (1956), p. 455.

21 Benedict & Stine, *The Agricultural Commodity Programs*, p. 454. There were even differences within the AAA as to the basic approach to accomplish the desired objectives, and the plan of organization was drastically overhauled in December, 1933, after Chester Davis became the Administrator. The agreements had also undertaken to establish and enforce retail milk prices, and there was a marked decline in dealer interest when the government announced

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One of the major issues raised was whether the AAA was attempting to regulate intrastate commerce, the previous question being whether the states were burdening interstate commerce. Another controversy related to whether the AAA could legally control production through some of the measures in the agreements and licenses, and still another question that recurred with regularity was whether the Act involved an unconstitutional delegation of power to the Secretary.

Non-compliance with the licenses became commonplace, and the growing spread between fluid milk and that used for manufacturing purposes enabled many dealers to manipulate prices to the injury of producers. Non-violators watched their competitors continue to refuse to make payments to marketwide equalization funds and decline to pay administrative assessments and other charges. Those dealers who refused to cooperate found many adherents among producers who objected to the bases awarded them under the licenses or who opposed equalization with other producers. The situation was compounded by the admitted illegalities in the licenses, and the Department of Justice even refused to bring suit against some cooperative handlers for monies owed the equalization pool because of the AAA's acknowledged failure to assign bases to about half of the milkshed's producers, the uncertainty in respect to the prevailing prices because of refusal or failure of many handlers to furnish reports of prices and sales, the resultant basing

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Ftn. 21 (Cont'd.)
in January, 1934, that it would not continue to establish resale prices. Dealers refused thereafter to become parties to marketing agreements and those in effect were terminated by the AAA on February 1, 1934. Reliance then came to be placed entirely on the licenses but enforcement was virtually impossible because of the tedious and time-consuming nature of the work involved, the tendencies of courts to refuse to apply drastic penalties for minor violations, and the inclusion of illegal features in many programs.

of the Administrator's blended price on conjecture, and the questionable legality of a number of features of the Boston program.[22]

The problem of enforcement was aggravated in the Boston market by the insistence of Massachusetts producers and the Massachusetts Milk Control Board that such producers could not be required to equalize their price with other producers and by the Board's resultant failure to enforce the federal license on intrastate milk. As previously stated, only a small amount of the milk, if let unregulated, could adversely affect the price of all other producers, and many small handlers buying Massachusetts "nearby" milk were not complying with the license. (A. 633). The AAA was thus forced to capitulate to the Board and nearby producers on a supposedly temporary basis (A. 230, 234-35, 238, 241, 245) in order to gain the essential enforcement support for the fledgling program. (A. 193, 237, 405, 633). In exchange for such enforcement support, it was agreed that Massachusetts producers located within 40 miles of Boston who delivered directly to market would be given preferential bases or quotas for their milk.[23] The situation continued to deteriorate, however, as legal attacks were mounted against the federal licenses.

The Congress, of course, was fully aware of the continuing existence of many of the factors that contributed to disorderly marketing and ruinous price conditions and of the new elements that had developed within various markets to compound the difficulties of the AAA. Additional controversy within the industry and lessening of

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22 "A lack of full agreement between the Agricultural Adjustment Administration and the Department of Justice, and within the Agricultural Adjustment Administration itself, further complicated the situation." Benedict & Stine, *The Agricultural Commodity Programs*, p. 374.

23 The early base-rating assignments under the Boston licenses are discussed in detail hereafter.

confidence on the part of producers had been occasioned by the Secretary's announcement that audits of the books of dealers in Boston, Philadelphia, St. Louis and Chicago disclosed net profits of 22.45%, 30.76%, 14.64%, and 25.84%, respectively, during the depression period. As a consequence, on June 15, 1934, the Congress had directed the Federal Trade Commission to investigate the milk industry.[24] The Report of the FTC for the Boston milkshed was not completed until June, 1936 (H. Doc. 501, 74th Cong., 2nd Sess. 1936) but the FTC Report for the Connecticut and Philadelphia milksheds was ordered to be printed by the Congress on April 5, 1935, and that Report documented a number of the problems and practices that existed in virtually every milkshed and fully confirmed the need for extensive legislation to deal with the myriad matters that the 1933 Act failed to remedy. The FTC Report emphasized the need for marketwide control, a uniformity of price and treatment for all producers within the milkshed, the inability and refusal in some instances of associations to effect either objective, and the affirmative action of some associations that tended to foster fluid milk monopolies for some members.[25]

Even prior to this time, however, the Congress was aware that the 1933 Act might not survive a court

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[24] The Congressional resolution, H.R. Con. Resol. No. 32, 73rd Cong., 1st Sess., noted that during the same period "the wholesale price of milk sold by farmers declined by 50 per centum", and that "there is reason to believe that there exists a close tie between certain leaders of milk producers cooperatives and milk distributors, which tie is unbeknown to milk producers and detrimental to their interests," the resolution further stating that, "the continuation of the practices now engaged in by milk distributors and certain leaders of milk cooperatives seriously endangers the efforts of the AAA and of the several States to alleviate and remedy the distress now widespread among dairy farmers in the United States..."

[25] H.R. Doc. 152, 74th Cong., 1st Sess. (1935). See testimony of C.E. Hough at pp. 130-33, 142, and of Evanuk, Foster and Exh. 71. Also A. 681-82.

challenge on constitutional grounds.[26] This Court handed down its decision in *Panama Refining Co. v. Ryan,* 293 U.S. 388, on January 7, 1935, holding that the power sought to be delegated under Sec. 9(c) of the NIR Act was legislative power, such attempted delegation being void because of the absence of any definite standard or guide.

This Court's decision in the *Schechter* case[27] repeated its prior action in the aforesaid case in respect to Section 3 of the NRA concerning delegation of legislative power, and it also held the entire Act unconstitutional, as applied to that case, because it exceeded the power of Congress to regulate intrastate commerce. This case re-emphasized the need for Congressional action, and it was able to act without undue delay because of its continuous study of the situation over an extended period during which numerous bills were introduced, each succeeding bill drafted in the House Committee on Agriculture being larger, more detailed, and more restrictive of the powers of the Secretary than the previous one. See 79 Congressional Record 9465, 9478, 11033-34, 11036 (1935).[28]

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26 "As early as 1934, the administrator of the AAA and the Department of Agriculture had sought, unsuccessfully, to have the marketing agreement provisions of the law amended and strengthened. By the summer of 1935, it had become evident that the low as then drawn could not be made workable." Benedict & Stine, *The Agricultural Commodity Programs,* p. 374.

27 *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495.

28 "The provisions of the present act which relate to marketing agreements and licenses are of vital importance to 2,000,000 or more farmers. These provisions have been extesnively revised in the proposed amendments . . . " S. Rep. No. 1011, 74th Cong., 1st Sess. 2 (1935); "Under the amendment proposed in the bill, the orders can be made applicable only to certain commodities named in the bill, and can contain only such terms and conditions as are *expressly* authorized in the bill. Furthermore, the amendments contain provisions intended to safeguard the exercise of and prevent abuses in the application of the regulatory power conferred upon the Secretary." H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935).

4. THE LEGISLATIVE REVISIONS OF AUGUST 24, 1935

"This legislation, though actually passed as part of the Agricultural Adjustment Act amendments of 1935, was so extensive that the enactments later were designated collectively as the Marketing Agreement Act of 1935."[29]

The system of licenses was discontinued and replaced with "orders" issued by the Secretary in respect to certain named commodities and such handling thereof "as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof."[30] The relevant section of the Act, 608c, also provided that the orders, unlike the licenses, could be issued by the Secretary only after a hearing, 608c(3), and then only "if he finds, and sets forth in such order, upon the evidence introduced at the hearing * * * that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy" of the Act. 608c(4).

Section 608c(5) of the Act pertains to milk and its products and provides that the orders "shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) *no others.*"[31]

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[29] Benedict & Stine, *The Agricultural Commodity Programs*, p. 460-61.

[30] This definition embraced the marketings of Massachusetts "nearby" producers.

[31] There was no limitation on the terms and conditions that could be included in the licenses, a situation that resulted in the insertion of illegal and improper terms by interested parties who would hardly propose a disadvantageous condition or term.

Subsection 8c(5)(A) empowers the Secretary to classify milk in accordance with the form in which or the purpose for which it is used by the handlers and to fix, or provide a method of fixing, *minimum* prices for each use classification which all handlers shall pay for milk purchased from producers, the minimum prices being subject to certain enumerated adjustments hereafter discussed.[32]

Under the Order, the milk used for fluid purposes is assigned to Class I and carries the highest price because it returns a greater price and profit to the handler than the surplus or manufactured milk which is assigned to Class II or broken down into even lower classes. The Class II milk in this market is no different from the milk used for Class I purposes, but it returns a lower price and profit to the handler when disposed of in such manner and is therefore assigned a lower price.

The 1935 Act provided "for the payment to all producers and associations or producers delivering milk to the same handler of uniform prices for all milk delivered by them," and subsection 8c(5)(B)(i) thus authorized individual-handler pools if such type of pooling was approved by at least three-fourths of the producers in the regional milkshed after a referendum on this issue alone and in which each producer would cast his own ballot. Under individual-handler pooling, every producer serving the same handler receives a uniform price for his milk,

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32 "Such orders may contain provisions classifying milk in accordance with its ultimate utilization and may fix, or provide a method of fixing, minimum prices which shall be paid by handlers to producers for milk in each use classification. This provision makes it possible to take into consideration in orders dealing with milk, the difference in value between milk sold for consumption in fluid form and that used in the manufacture of such products as butter, evaporated milk, etc. Minimum prices fixed in such orders are required to be uniform as to all handlers * * *." H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935). See also S. Rep. No. 1011.

computed from the average use made of all milk by the handler, and irrespective of the use made of his particular milk.

Alternatively, the Act provides in 8c(5)(B)(ii) "for the payment to all producers or associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered." This provision obviously authorizes the marketwide equalization pool that was needed in the Boston and Connecticut milksheds, the absence of which prevented uniformity of price among handlers and producers and resulted in market instability, price-cutting, and self-defeating competition.[33]

The Massachusetts-Rhode Island Order provides for the marketwide pooling of milk, the Secretary stating as follows in his 1964 decision (A. 347, 358-59):

> "It is clear that a single marketing area has developed where previously separate markets existed. Under this circumstance, the economic stresses, market instability, and price uncertainties which have developed and persisted must

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[33] "*Alternative* methods of distributing the total dollar value of all milk sold among the producers supplying the market are provided. Uniform prices are required to be paid to all producers for all milk delivered by them irrespective of the use to which such milk is put by the particular handler to whom any producer or association of producers sells its milk. An alternative provision may be included, requiring instead the payment of uniform prices by each handler to all producers and associations of producers delivering milk to him, but, except in the case of orders covering manufactured milk products only, such a provision may not be included unless the Secretary finds that its inclusion is approved or favored by three-fourths of the producers by number or by volume of production." H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935). See also S. Rep. No. 1011.

> be eliminated by the adoption of a single order with a single marketwide pool. . . . The major readjustment of the entire marketing structure in New England which undoubtedly would accompany the institution of individual-handler pooling would not promote the objective of more uniform alignment of prices to producers which, as elsewhere described in the decision, is important to orderly marketing in New England. The application of marketwide pooling under a merged order will promote market stability by insuring that all producers supplying the Massachusetts–Rhode Island market will share on a uniform basis the Class I and Class II utilization in the entire market and thus assist to permit the assembly of supplies in an economical manner for available outlets. Accordingly, the proposals for individual-handler pooling are denied." 29 Fed. Reg. 11205, 11208.

Since some handlers dispose of most of their milk for fluid or Class I use and others primarily for Class II or manufacturing use, it is obvious that some system would have to be devised to enable each handler to pay his producers the uniform or marketwide average price. Also, subsection 8c(5)(A) specifies that handlers shall pay the minimum prices set for each use classification of milk, a seemingly inconsistency with the requirement of (B) that all producers be paid a uniform price. However, 8c(5)(C) of the Act authorizes the Secretary, in order to accomplish the purposes set forth in (A) and (B), to provide a method for making adjustments in payments, as among handlers, to the end that the total sums paid by each handler shall equal the value of the milk purchased by him according to the minimum classified prices.

The Order therefore provides for a producer settlement fund to be administered by a Market Administrator, and handlers are required to submit monthly reports on the total purchases made by them in each use category at the respective minimum prices. A marketwide average or "blended" price is computed by adding together such sales by all handlers and dividing by the total amount of milk. Those handlers who disposed of most of their milk for fluid purposes, and therefore at an overall monthly return in excess of the markets' uniform price, are required to pay the excess over their sales into the fund or pool. Those handlers who disposed of most of their milk at Class II use, and thus below the marketwide average or uniform price, are entitled to withdraw such monies from the fund in order that they may pay their producers the uniform price. In this way, handlers pay for their milk according to the value of the same to them at the respective classified prices, and each producer is thereby enabled to be paid the required uniform price, irrespective of how his particular milk was used by the handler to whom it was delivered.

It is as if all the milk in the milkshed was placed in a giant pool from which all the handlers procured their supplies, paying for the same according to the purpose or use made of the milk, the payments then being divided up in such manner that each producer received the same uniform price for his milk in the pool, none of which can be distinguished from the milk of any other producer and all of which is available for fluid or Class I use. This is the true concept of marketwide equalization pooling of milk (A. 669-73), and the producer settlement fund, with its system of debits and credits for the individual account of each regulated handler, is the formal device for effectuating the equalization of payments. The Act clearly authorizes such action by the Secretary under 8c(5)(C), and the carefully drafted

Congressional reports accompanying the 1935 Act likewise confirm such power.[34]

As in the case of 8c(5)(A) relating to payment by handlers at the classified minimum prices, 8c(5)(B)(i) and (ii) provide that the uniform price required to be paid to producers shall be:

> "subject in either case, *only* to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, * * * during a representative period of time, * * *."[35]

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34 "Milk orders may also provide a method for adjustments among handlers so that the payments for milk made by each handler shall equal the value of the milk to the handler in the use classification to which it has been devoted by him." H.R. Rep. No. 1241, p. 11; Sen. R. No. 2011, p. 11

35 "The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience which is caused to producers by closing up plants to which they have been delivering and requiring that all of their milk be handled by one plant, is compensated by an additional payment to the producers. The production differential is the differential which is paid to a producer to compensate him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. It is necessary to keep this supply of reserve milk available for periods in which consumption of fluid milk goes up. The effect is that the producers are paid for keeping their farms in the same condition as if they were shipping milk into the city every day. The production differential is a payment to the farmer for

(Cont'd.)

The specified adjustments to the uniform price are discussed in a subsequent part of this brief, but it should be noted here that adjustment (d) is concerned with minimizing the seasonal fluctuations in milk production. It authorizes the establishment of plans for such purpose (A. 360) which are variously known as base-rating, base-surplus, base-excess, or Class I base-rating plans. Such a plan contemplates the assignment of a "base" or quota of milk for each producer, determined by his deliveries of milk over a representative period of time, usually the short production season, for which the producer is paid the Class I or fluid milk price for all milk delivered within his "base." He may produce more milk than his base but receives only the Class II or surplus price for milk in excess of his base.[36] Due to varying amounts of deliveries among producers, it is evident that their bases cannot be equal but they must be determined in the same manner over the same period of time, other than for new producers. All producers are entitled to the Class I price for their base milk, and there are certain safeguards provided for in the legislation to prevent

Ftn. 35 (Cont'd.)
performing this function in the market. The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets." H.R. Rep. No. 1241; see also, S. Rep. No. 1011.

36 "In order to eliminate, so far as possible, violent seasonal fluctuations in the available milk supply with their attendant disturbing effect upon returns to producers, and to encourage a uniform volume of production throughout the year, an adjustment in payments to producers upon the basis of their production records may be included in such orders, in addition to the adjustments described above." H.R. Report No. 1241; see also S. Rep. No. 1011.

an abuse of this provision, in that such a plan had to be separately approved by producers in a referendum on this one issue by the individual vote of the producers.[37] The early base-rating of the licenses and 1936 Boston Order did not conform to the requirements of lawful base-rating by virtue of the fact that only certain producers received bases and the nearby producers were the only producers to receive a Class I price for their base milk, the other producers receiving a composite price that reflected the surplus of the market. (A. 231 (No. 2), 225 (Sec. 2-1), 236, 634-35).

Neither this Order or the Connecticut Order includes a base-rating plan, although both Orders do include a seasonal incentive plan that accomplishes the same purpose by withholding a part of the uniform price in the flush production months and adding such withheld sums to the uniform price during the short production months. 7 C.F.R. 1001.64; 7 CFR 1015.64; See 32 Fed. Reg. 5288, March 29, 1967.

The nearby farm location differential is not among the enumerated adjustments in the Act, and no mention of such a differential is contained in either Congressional report.

Two other provisions of the Act are relevant, however, for Subsection 8c(5)(D) provides that any new producer shall be paid for the first two months of regular delivery of milk at the price for the lowest use classification, "subject to the adjustments specified in paragraph (B) of this subsection." This provision is to protect the regular suppliers of the market from those who would choose to make their milk available only at opportune times and who would thus refuse to bear the surplus of the market and the responsibility for assuring an adequate supply of

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[37] See subsection 8c(5)(B)(ii)(d) and also the Food and Agriculture Act of 1965, 79 Stat. 1187; H.R. 9811, 89th Cong. (1965).

milk for the market. Handlers had previously used such milk to beat down local prices within a milkshed, and this provision not only protects the milkshed's regular producers but also assures any producer of the right to enter a market on the same terms as regular producers after the two month period.[38]

The period of three months was changed to two months during a conference between the House and Senate. (H.R. Rep. No. 1757, 74th Cong., 1st Sess. 2 (1935), Amendment No. 22).

Companion subsection 8c(5)(G) of the Act provides as follows:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

The above provision was introduced in the course of House debate on the 1935 legislation and no additional

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38 "To prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market by the introduction of new producers or new producing areas, orders may provide that for the first three months of regular delivery, payments shall be made to producers not theretofore selling milk in the area covered by the order at the price fixed for the lowest use classification. *This is the only limitation upon the entry of new producers–wherever located–into a market, and it can remain effective only for the specified 3-month period.*" S. Rep. No. 2011, p. 11; see also, H.R. Rep. No. 1241, p. 10, for very similar language.

language was added to the Congressional reports, although the conference report makes reference to (G) in Amendment No. 24, H.R. Rep. No. 1757, 74th Cong., 1st Sess. 3 (1935). In addition to the detailed analysis of the bill H.R. 8492 in the lengthy House and Senate reports, the Conference report treats 52 amendments and notes that the House receded from 95 amendments and the Senate from 12, only 4 amendments resulting in disagreement and none of which relate to milk. The Statement of the Managers of the bill on the part of the House discusses 162 amendments.

The Act also contains a provision specifying that the minimum prices fixed by the Secretary were to be exercised "within specific *regional* areas", 8c(11)(A), and all orders "*except in the case of milk and its products*" are to be limited to the smallest practicable *regional* area under 8c(11)(B). Different terms and conditions are to be prescribed in the various orders issued for each *regional* area under 8c(11)(C).[39]

A number of provisions of lesser relevancy are set forth in the Act and are referred to in the Reports of the House and Senate. Such provisions are noted in subsequent parts of this brief where appropriate and germane to the issue.

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39 "So that proper recognition may be given to local differences which may exist in production or marketing methods or conditions, orders are required to be limited in their application to the smallest practicable *regional* production or marketing areas, and orders applicable to the same commodity or product are required to prescribe such terms applicable to different production or marketing areas as will recognize local production and marketing differences. Orders relating to milk and its products are exempted from the requirement that they be limited in their application to the smallest practicable *regional* production or marketing areas." H.R. Rep. No. 1241. See also, S. Rep. No. 1011.

5. THE PROCEEDINGS BELOW IN THIS CASE

The respondents brought this action against the Secretary of Agriculture on December 27, 1966, for themselves, individually, and for the benefit of all other dairy farmers similarly situated in the States of Vermont, Maine, New Hampshire and other states, and whose farms are so located as to render them ineligible for the "nearby farm location differential" payments of the 1964 Massachusetts–Rhode Island milk order. Their complaint requested a judgment declaring the invalidity of the nearby differential provision, 7 C.F.R. 1001.72, as well as an injunction against the future enforcement of such differential provision by the Secretary.

The District Court, after fully contested hearings on the matter, issued a preliminary injunction on January 16, 1967 (A. 62) against the Secretary and provided therein for the escrowing of the contested differential payments during the pendency of the suit. Since the nearby differentials are deducted from the marketwide equalization pool prior to computation of the uniform price, approximately 25 percent of the nearly differentials emanate from nearby producers who receive such 25 percent back along with the other 75 percent of the differentials emanating from non-nearby producers. The preliminary injunction provided for the escrowing of the entire differential payments, and the plaintiffs were contemplating proceeding against the 25 percent of the differentials emanating from nearby producers if they prevailed in the case. The *Blair* opinion had indicated that it would be unfair to pick and choose individual producers from whom to demand redress for past damages but this situation would not apply where the monies of all nearby producers were in a fund against which the non-nearby producers could levy claims for damages. The nearby producers' attorneys, who participated in the *Blair* case in both the district and circuit courts and who have participated in

this case from its very beginning, requested the Secretary to suspend or terminate the nearby differential during the pendency of the legal proceedings in order to avoid the escrowing of the nearby producers' monies and preclude the possibility of such monies being lost to non-nearby producers as damages for past nearby differential payments. The suspension or termination of the nearby differential would have put an end to all escrowing, and the nearby producers were thus willing to forego the nearby differential payments emanating from non-nearby producers which have been escrowed during this litigation. A similar request for suspension of the nearby differential of the Connecticut Order was made shortly after the issuance of the preliminary injunction in this case and *prior* to the institution of the *Cranston* suit on February 9, 1967. These requests were not granted because such suspension would constitute an indirect admission of the invalidity of the nearby differential.

Two cooperative associations, the Connecticut Milk Producers Association (CMPA) and the New England Milk Producers Association (NEMPA), attempted to intervene as defendants on January 5, 1967, said associations being represented by Reuben Hall, Frederick Conard, and present counsel for petitioners Zuber, *et al.* (A. 36, 58, 711), who were likewise associated as counsel for the CMPA and NEMPA in the *Blair* case. On January 11, 1967, date of the hearing on the preliminary injunction, a motion to expedite the case was filed by the government with the approval of the present attorneys for petitioners Zuber, *et al.*, said motion proposing that the case be heard on cross-motions for summary judgment on February 8, 1967, and that the motions of the government and applicants for intervention be filed on or before January 27, 1967 (A. 57). The motion of the CMPA and NEMPA for intervention was denied (A. 61), and it should be noted that no problem existed as to the administrative record at that time.

On January 23, 1967, plaintiffs filed a motion for an order authorizing the maintenance of the suit as a class action, and an Order (A. 68) was entered to such effect on February 1, 1967, after a full hearing. The plaintiffs increased the individual plaintiffs to 168 at that time (A. 72) and offered to increase the number to 1,000 if necessary (A. 67). In view of the attempt of petitioners Zuber, *et al.*, to equate the plaintiffs' representative suit with their unsupported actions herein, the plaintiffs have filed the handwritten names and addresses of over 2,000 additional plaintiffs in the district court.

In spite of the request for expedition and the alleged need for the differential payments related in affidavits (A. 60) filed by the Zuber petitioners on January 11, 1967, they delayed filing their motion for intervention (A. 84) until February 24, 1967, date on which plaintiffs filed for summary judgment (A. 72-83). The Zuber papers proposed additional delay because of alleged unavailability of the administrative record, and the government moved on March 6, 1967, for a suspension of proceedings pending the exhaustion of alleged administrative remedies on the ground that it had discovered that a non-nearby dairy farmer had requested the termination of the nearby differential in connection with an administrative hearing involving other matters. That hearing had been concluded long before the present suit was filed, and the Act accords an administrative remedy only to handlers.[39a] The plaintiffs opposed the government motion on several grounds (A. 87), and it was denied by Order entered on March 13, 1967 (A. 107). The Zuber motion to intervene was denied on March 21, 1967, after a full hearing (A. 119), and a motion for summary reversal upon appeal thereof was denied by the Court of Appeals on May 5, 1967 (A. 129-30).

[39a] See Public Law 90288, 82 Stat. 93-5, April 16, 1968, Sec. 6(a) giving producers the right to obtain temporary injunction and Sec.6(c) according right to sue for damages, plus attorney fees and costs, for discriminatory practices without resort to any administrative "remedy".

Although plaintiffs were repeatedly and intentionally served with motions, affidavits, etc., immediately prior to various hearings in order to prevent adequate opposition thereto (A. 59-60, 139-47, 659, 216 and designated items deliberately omitted from appendix), they offered petitioners Zuber, *et al.*, at least three different opportunities over a period of two months to present any claim, defense, or material that they wished the district court to consider, even after said petitioners' motion for summary reversal of denial of intervention was denied by the Court of Appeals (A. 657, 658-59, 111). They also furnished both petitioners with a list of all pages of the 5,000-page administrative record for the 1964 Order in which the nearby differential was mentioned (A. 108-09), and it is noted that such list, furnished on March 17, 1967, includes the page reference containing testimony that petitioners Zuber, *et al.*, now claim they would have brought to the attention of the district court at the hearing of May 16, 1967, if allowed to intervene therein. Petitioners Zuber, *et al.*, did avail themselves of such opportunity by filing an extensive brief *amicus curiae* in the name of the Commonwealth of Massachusetts (A. 125) on May 15, 1967, the day before the hearing on summary judgment, and have worked with government counsel throughout this case. Further, the plaintiffs suggested and consented to a modification of the preliminary injunction (A. 109) in order to allow the nearby producers to receive their escrowed monies and their full uniform price without deduction therefrom in the future. Said modified Order was entered on March 17, 1967, after petitioners' attorneys stressed the need of nearby producers for said funds, the plaintiffs also waiving any claims against said producers for past damages in reliance upon representations of petitioners' attorneys that plaintiffs would have their escrowed monies returned to them if they prevailed herein.

Plaintffs inquired of the government as to whether any additional administrative records were considered necessary for the court's consideration (A. 660-61), and they filed

summaries in anticipation of the furnishing of such records when no reply was forthcoming from the government (A. 661-704). Such summaries set forth the testimony *favoring* the nearby differential, and the main summary for the 1964 Order hearings was supported with the pages of the administrative record cited in the summary. The other administrative record material filed by the government consisted of pertinent parts of the hearing record for the first Boston Order of February 9, 1936; that for the 1937 Boston Order containing the first nearby differential; that for the 1951 Boston amendatory hearings relating to the nearby differential; and that for the 1964 consolidated Order involved herein, together with the respective Orders and Decisions of the Secretary relating to all of said records. Plaintiffs also filed relevant parts of the economic brief of the USDA for the 1937 Boston Order hearings, and such brief (A. 669-73), which petitioners Zuber, *et al.*, maintain should not have been considered by the district court, is virtually identical in language to the Boston *Handbook for Producers*, which they contend they would have brought to the attention of the court if allowed to intervene. After being furnished with summaries of the hearing records pertaining to the secondary milk orders (A. 689-704), the government failed to produce such records which had been certified by the USDA and transmitted to government counsel (A. 120).

A memorandum granting summary judgment was filed on May 24, 1967 (A. 120) subsequent to full hearing thereon on May 16, 1967, and the court entered an Order and Judgment on June 15, 1967 (A. 121) after objection and response (A. 728) thereto. The Order and Judgment consisted in large part of prior orders prepared by the court (A. 62, 68, 107, 109), and the court previously and thereafter rejected various proposed orders submitted by all parties and applicants for intervention. The court also took the step of filing various proposed orders to show that they had been considered by the court (A. 165, 3, 5), and most

of those proffered by the petitioners were rejected because of inaccurate, unfair and prejudicial language therein.

When it appeared that the Secretary did not intend to appeal the judgment (A. 129), the petitioners Zuber, *et al.*, were allowed a choice of continuing with their appeal concerning denial of intervention or abandoning the same in favor of intervening for the sole purpose of prosecuting an appeal from the judgment (A. 129). They notified the Court of Appeals that they chose to appeal the judgment but they presently attempt to pursue both the appeal of the judgment and the denial of intervention in violation of their own representations and the Order of the Court of Appeals. Moreover, they have attempted to bring before this Court the denial of intervention of the NEMPA which was never appealed and which initial attempt to enter this case was unbeknown to and against the wishes of its non-nearby members (A. 166-86). Although plaintiffs consented to a number of matters in the district court, even in respect to continuance of the escrowing of their own monies until a hearing could be held thereon after the judgment of the district court (A. 111, 131-33 (consent not printed), 659), the petition of Zuber, *et al.*, to this Court actually stated that plaintiffs had "forged" the record below. Those petitioners have not only utilized such misrepresentations to accomplish their own ends but have appeared in court without any notice to plaintiffs in attempts to obtain orders to their advantage and have also intentionally given little notice of such appearances on other occasions. (A. 139, 143, 659)

The USDA issued a recommended decision on July 6, 1967, in connection with the aforesaid administrative hearing and proposed therein to continue the nearby differential on the basis of "new findings" to replace those not made in 1937 and the deficient findings made in 1964. A motion to preserve the effectiveness of the Order and Judgment of June 15, 1967, was filed by plaintiffs

(A. 133), and the transcript of the hearing (A. 148) illustrates the attempt to circumvent the Court's Order and Judgment. The government subsequently appealed the district court's judgment. The Court of Appeals entered its decision on the consolidated appeals on September 23, 1968 (A. 167, 216), affirming the judgment of the district court but awarding the nearby producers that portion of the escrowed monies emanating solely from the non-nearby producers which were collected prior to the district court's Judgment of June 15, 1967, the balance of the monies escrowed thereafter being awarded to the non-nearby producers. The respondents filed a petition for certiorari from that part of the lower court's decision that awarded a portion of their monies to nearby producers but no action has been taken by the court on said petition, No. 26 herein.

SUMMARY OF ARGUMENT

The nearby differential is unauthorized under the Act by reason of the fact that it diverts a part of respondents' uniform minimum price to illegally preferred "nearby" producers on the basis of the historical use of their milk for fluid use and in violation of the command of the Act and the marketwide pooling provision thereof that all producers are to be paid a uniform price for their milk, irrespective of the use thereof. The historically higher prices allegedly received by nearby producers also relate to fluid use of milk, and those compiled under Federal or State regulation are incompetent for any purpose, particularly when all producers were receiving depressed prices prior to the Act.

The differential payments are geared to the fluid use of milk, being paid at 46¢ per cwt., or such lesser sum as will equal the fluid milk price. Its operation constitutes a use apportionment of the marketwide equalization pool with

resultant payment based on use of milk, the injury being the greatest to respondents when the prices are the lowest.

The differential does nc' constitute one of the enumerated statutory adjustments to the uniform price, being based on location of the producer's farm rather than on the location at which delivery of his milk is made. Nor is it a market differential, for this adjustment is the direct delivery differential provided for in the zone differential provision of the Order and which is paid for the savings effected when milk is delivered directly to a city market rather than to a country plant where double handling is involved. A nearby producer may deliver his milk to a country plant and receive the nearby differential, whereas a non-nearby producer may deliver his milk to the market center and he still has to pay the nearby differential, this fact conclusively indicating that location of the producer's farm is the critical criterion. Moreover, the Secretary admitted in the *Blair* case that the nearby differential involved in this case could not be issued on the authorized market differential and that all nearby differentials had always been issued as location differentials under 8c(5)(B)(ii)(c) of the Act.

The Act provides for differentials customarily applied by handlers, not producers, and the differential is illegally discriminatory because nearby producers provide no service or value for the payments. The preferential price treatment to nearby producers is compounded by the requirement that the differential be paid out of respondents' minimum milk price, and this violates respondents' rights to due process and equal protection of law.

The Act provides only for the payment of *minimum* prices, and the nearby producers may receive any premium from handlers if their milk actually does have any additional value. They could not be injured by the termination

of the differential, and their insistence that respondents pay the differential is an admission that nearby milk has no additional value. The Secretary has found that handlers should pay for the factors of availability, accessability, or inherent value of nearby milk, and the nearby producers are already compensated for the location value of their milk by the differentials for transportation and direct-delivery, as well as by the seasonal incentive plan for the factor of seasonality or evenness of production.

The Secretary's findings are deficient and inconsistent, and his conclusions are irrational and arbitrary, in that his findings not only relate to use of nearby milk but acknowledge that nearby producers required Federal regulation in order to maintain any market or reasonable price for their milk. His conclusions are at variance with those made in other decisions and completely self-contradictory.

The present nearby differential and Order, promulgated in 1964, is a final Order and the non-nearby producers continue to sustain irreparable injury by virtue of the differential. The differential in the 1937 Boston Order was not promulgated until after the re-enactment of the Act here involved, and that nearby differential applied to only 5% of the producers in the milkshed at a rate of 3 cents per cwt. The present differential has increased 400 percent by virtue of the 1964 Order and approximately one-fourth of the producers are now classified as "nearby" and entitled to the differential.

The petitioners have presented nothing to reflect in any manner upon the propriety of the granting of summary judgment by the district court and the affirmance thereof by the Court of Appeals. Indeed, the judicial validation of this differential would open the floodgates to the issuance of similar discriminatory preferences across the nation that would result in disorderly marketing and the eventual nullification of the Act.

ARGUMENT

A. THE NEARBY DIFFERENTIAL IS UNAUTHORIZED UNDER THE ACT AND CONTRARY THERETO.

1. The nearby differential violates the Act's requirement of a uniform price, irrespective of the use of milk.

The very heart of the Act is its requirement that all regular producers be paid a uniform price for their milk irrespective of how it is used by the handler to whom it is delivered. This legislation was urgently needed by all dairy farmers, and the chaotic conditions and depressed prices that led to its passage are recognized in the Act itself, the legislative history, and in several court decisions.[40] The fundamental problem, which was particularly acute in New England, was a surplus of milk and a resultant self-defeating and cut-throat competition among dairy farmers for a fluid market outlet. The Congressional answer was a carefully devised program that provided for the sharing of the benefits (fluid or Class I use) and the burdens (surplus or Class II use) of the milk market by all dairy farmers through the medium of a uniform price, irrespective of the use made of the milk of a particular producer or group of producers.

The Congress was necessarily aware that a few producers, through circumstances or good fortune, might have a preferential price position with a handler who disposed of his milk for fluid or Class I use. But it was also totally aware of the overall disorderly marketing conditions and demoralized price structure in all markets and of the necessity for such few producers to forego any transitory

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[40] *United States v. Rock Royal*, 307 U.S. 533; *Hood & Sons v. Dumond*, 336 U.S. 525; *Blair v. Freeman*, 370 F.2d 229.

price advantage they might have in order that a sound foundation might be formulated for a program that would stabilize marketing conditions, improve the natural economy and credit structure, and inure in other respects to the common good of producers and consumers alike:

> "§ 601. DECLARATION OF CONDITIONS.
> It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the *national credit structure* and that these conditions affect transactions in agricultural commodities with a *national public interest*, and burden and obstruct the normal channels of interstate commerce."

The lower court in *Blair v. Freeman*, 370 F.2d 229 (1966), recently reaffirmed this keystone purpose of the legislation when it stated:

> "The core of the Congressional program was a uniform price for producers that did not turn on or vary with the nature of the use for which a producer was able to dispose of his milk. Hectic and unsettling competition among producers impelled Congress to formulate a device – uniform prices apportioned irrespective of individual utilization – that would recognize the use factor in the computation of the marketwide pool, but would not distinguish between producers on the basis of the use made of their milk."

This core or heart of the Congressional program has been consistently recognized by every court which has had this question before it, and the Economic Brief of the USDA (A. 669-73), filed in the hearing record for the 1937 Greater Boston milk order clearly sets forth this

basic feature of the legislation in explaining individual-handler and marketwide pooling of milk:

> "The use plan of payments for milk puts all handlers in the market on an equitable competitive basis, and *equalization of fluid milk sales* is intended to do the same thing for all producers. Equalization of fluid milk sales is simply an extension of a plan that has been employed by each handler and each cooperative creamery.[41] If a creamery sold 75% of its milk as whole milk and the remainder as cream, it did not pay 75% of its producers the fluid milk price for all their milk and the remaining 25% the cream price for all of their milk. Such a method obviously would have been inequitable. Instead each producer was paid the whole milk price for 75% of his deliveries and the cream price for the remaining 25%. Under the proposed amendment to Order No. 4 the fluid milk sales of the whole market are distributed among all producers in the milkshed in exactly the same way as though they were all members of a cooperative association which equalized its fluid milk sales among its members.[42] * * * The actual operation of the equalization plan is simply a means of distributing to all producers equally the value of the fluid milk sales

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41 Congress intended to "follow the methods employed by cooperative associations." H.R. Rep. No. 1241, 74th Cong., 1st Sess.; S. Rep. No. 1011, 74th Cong., 1st Sess. (1935).

42 No marketwide pool existed prior to federal regulation in the Boston market and, therefore, no nearby differential could have been paid from out of such non-existent source.

> in the market by all handlers. With a 40% surplus in a market, each producer should get surplus prices on 40% of his deliveries. The Class I and Class II sales are not distributed equally among handlers. One handler may have no Class I sales, yet his producers are entitled to Class I price for 60% of their deliveries. But another handler may sell 100% of his producers' milk as Class I and his producers, if they are to carry the same amount of surplus as other producers, should get Class I price for only 60% of their deliveries. * * * ."

The respondents confess an utter inability to perceive even the slightest logic or merit in the novel and limited contentions now made by the petitioners that producers may be paid on the basis of the use made of their particular milk. Indeed, the brief (A. 715) of the Secretary in the *Blair* case stated as follows at the very outset of its summary of argument in this regard:

> "Congress, desirous of eliminating the cut-throat competition between milk producers, enacted the Agricultural Marketing Agreement Act (50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*) and authorized the Secretary of Agriculture to promulgate milk marketing orders with the object, *inter alia,* of insuring that producers would receive uniform minimum prices for their milk regardless of the use made by the handler *of their particular production.* 7 U.S.C. 608c(5)."[43]

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[43] The Secretary's brief in *Blair* was filed as an exhibit in the District Court and is part of the original record filed in this Court. The Secretary admitted in *Blair* that the 1937 Boston nearby differential was "identical in purpose and effect" (A. 718) and promulgated on "very similar findings" (A. 722) as the N.Y.–N.J.

(cont'd)

And in *United States v. Rock Royal,* 307 U.S. 533 (1939), this Court accepted the Secretary's argument concerning this keystone feature of the statute when an attack was made on the equalization pool employed in the old New York federal order:

> "The result of the use of the device of an equalization pool is that *each producer,* dealing with a proprietary handler, gets a uniform or weighted average price for *his* milk with differentials for quality, location and other *usual* market variations, *irrespective of the manner of its use.*"

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[43] (con'td) nearby differential declared illegal in *Blair.* The brief admitted that the nearby differential had always been promulgated under 608c(5)(B)(ii)(c) as the location differential authorized for "the locations at which delivery of such milk is made" (A. 719), and it also quoted approvingly the Congressional definition of the market differential authorized under (a) to illustrate that the nearby differential could not be issued as the authorized market differential. (A. 715-16). Petitioners attempted to hide this item and other relevant exhibits by contending that they were not of record (A. 656) and by placing them at the end of Vol. 2 of the appendix. They then added undesignated material from the Secretary's brief which they contend is not of record to the beginning and end of excerpts designated by respondents in order to further conceal such admissions. The bulk of the excerpts from the brief printed in the appendix are those added by petitioners who also substituted the names of the *amici curiae* in *Blair* for that of the Secretary on the heading of such brief (A. 715) in a further attempt to hide such official admissions of the Secretary. It was only after this item and 112 similar major additions of undesignated material and at least 15 omissions were brought to the attention of the Second Circuit in the related *Cranston* case that petitioners hastened to advise for the record that they had discovered such single error and will correct the same.

The Court there noted that "handlers are not at liberty to pay *the producer* in accordance with the *use of the producer's milk* but must distribute the surplus to others whose milk was resold less advantageously", and it further stated in regard to the contention of a cooperative association that it need not equalize its fluid sales that, "If the cooperative members were freed of the burden of carrying their proportion of milk going to manufacturing use, the discrimination in their favor would be the most strongly marked."

As this Court also explained in *Lehigh Valley Co-op v. United States,* 370 U.S. 76 (1962), in commenting upon the operation of the marketwide equalization pool or producer settlement fund which effectuates the uniform price:

> "The net effect is that each handler pays for his milk at the price he would have paid had it been earmarked at the outset for the use to which it was ultimately put. But the farmer who produces the milk is protected from the effects of competition for premium outlets *since he is automatically allotted a proportional share of each of the different 'use' markets.*"

And the dissenting opinion in *Lehigh Valley* was to the same effect:

> "In order to put an end to this competition which was pushing farmers to the wall, *the 1935 Act* gave the Secretary specific power to set up *regional* marketing areas within which he could, for the Government, fix minimum prices handlers would have to pay to producers for the various uses of milk, require that those minimum prices be paid to a pool for the area and distribute the proceeds of the pool so that *each farmer* selling milk through the pool could ultimately be paid at the *same* uniform rate

> or 'blend price' *regardless of the use to which his particular milk was put.* 50 Stat. 246, as amended, 7 U.S.C. § 608c."

And the lower court in *Lehigh Valley*, 287 F.2d 726, also set forth in its decision the universal understanding concerning this fundamental aspect of the Act:

> "After adding the totals and making certain additions and/or subtractions not relevant here, he divides that figure by the aggregate volume of milk of all classifications used in the Marketing Area to determine the uniform price *which is paid to all producers regardless of the utilization of their milk.*"

Again in *Brannan v. Stark*, 342 U.S. 388, this Court also noted that, "Producers, however, are paid the same price for milk delivered no matter what use is made of the *particular milk* by the handler."

In *Grant v. Benson*, 229 F.2d 765, *cert. denied*, 350 U.S. 1015, it was stated:

> "Thus the price paid by the handler is geared to the use which he makes of the milk. In contrast, the marketing plan is designed to give the producer a uniform price for all the milk he sells regardless of the use made of it by the handler who purchases it."

Many other cases could be cited to like effect, and it must be noted that the Secretary himself has repeatedly acknowledged that a producer is required to be paid the uniform price for his milk on the basis of the average utilization of all milk in the milkshed under true market-wide equalization pooling instead of on the basis of the use of his particular milk. He has also acknowledged that he has deviated from this basic requirement in those few instances wherein he has succumbed to improper pressures and promulgated a nearby differential in a milk

order. Of the four milk orders consolidated into the Massachusetts–Rhode Island Order in 1964, only the Boston Order was larger in number of producers than the Southeastern New England Order which encompassed the State of Rhode Island and a substantial part of Massachusetts. The Secretary's decision of October 21, 1958, 23 Fed. Reg. 8238, promulgating the latter milk order stated as follows concerning payment of the nearby farm location differential to Massachusetts, Rhode Island, and Connecticut producers:

> "Historically, dairy farmers in the States of Massachusetts, Rhode Island and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid use than have dairy farmers in the upcountry area. Hence, nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk in the milkshed *rather than according to utilization of his own milk.* Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation. * * *".

The Secretary's rationale in issuing the Connecticut Order and nearby differential in 1959, 24 Fed. Reg. 1063, was also clearly based on the prohibited considerations respecting the use of milk of nearby producers for fluid purposes, and he again acknowledged the identical basis on which all of the nearby differential provisions had been promulgated:

"The Federal order markets in the New England and the New York-New Jersey market provide for similar differentials * * * . *The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes.*"

Again, in 1960 at 25 Fed. Reg. 7833, the Secretary found as follows in regard to the Connecticut nearby differential:

"As stated in the Secretary's decision of February 9, 1959 (24 F.R. 1049), the present provisions were established in recognition of the higher Class I utilization, and higher returns that nearby producers had customarily received over more distant producers."

The findings and rationale of the Secretary were virtually identical in issuing the nearby farm location differential of the New York-New Jersey Order in 1957, 22 Fed. Reg. 4213:

"Historically, the percentage of the milk produced nearest to metropolitan New York-New Jersey which is used for fluid purposes is higher than the percentage of more distant production which is used in fluid form. * * * Nearby producers have been able to get a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. When milk is pooled on a marketwide basis, the nearby producer is paid on the basis of the average utilization of all milk in the milkshed *rather than according to the utilization of his milk.* Together with *equalization,* however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and is protected to some extent from

> the loss of a market because of competition of cheap milk from more distant sources. The distant producer also benefits from an established Class I price, and in addition gains a larger share of the fluid market than is likely without equalization. * * * ".[44]

The foregoing findings openly admit that the nearby differential is a device to apportion the fluid milk market and price to nearby producers and that it is violative of the uniformity of price irrespective of use required under marketwide equalization pooling and the Act. The statute clearly provides, in 608c(5)(B)ii) authorizing marketwide pooling, "for the payment to *all* producers and associations of producers delivering milk to *all* handlers of *uniform* prices for *all* milk so delivered, *irrespective of the uses made of such milk by the individual to whom it is delivered.*" No exemption is provided in the Act for nearby producers or any other group of producers, and no exceptions are made for nearby milk or for the payment of "historical" rather than uniform prices. The Secretary's rationale in promulgating the present Order in 1964 is also consistently violative of the statute, in that he merely reaffirmed his position when he stated at 29 Fed. Reg. 11213:

> "Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values,

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[44] The Act's provision for uniform *minimum* prices to producers irrespective of use of milk prevents the Secretary from substituting his formula and use rationale for that of the Congress. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 10 (1935); S. Rep. No. 1011, 74th Cong., 1st Sess. 10-11 (1935); *Blair v. Freeman,* 370 F.2d 229.

above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant area as of the milkshed."

After diligent study[45] of the extensive testimony and evidence relating to the nearby differential of the New York-New Jersey milk order, compiled from a 15,000-page administrative record with hundreds of exhibits in which every aspect of the nearby differential was explored and examined, the *Blair* court made the following observation that is equally applicable to the above finding of the Secretary:

"We are aware that the Secretary's findings state that nearby producers have always been able to obtain a premium, over the price paid more distant producers, higher than can be accounted for in terms of cost of transportation to market. 22 Fed. Reg. 4213 (1957). If this history has any current significance, if the milk has greater "value" to the handler for reasons other than quality and location of delivery, it may be a reason for the producer to receive out of the handler's own pocket a premium above the minimum price, but it would not be a justification permitted by law for a diversion from appellants of their equal

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[45] *Blair v. Freeman,* 370 F.2d at 230. The Court of Appeals considered the case for 7 months before issuing its opinion which has been recognized as one of the most astute expositions on this subject that has ever been handed down by a court of law. A re-reading of the decision emphasizes not only the depth but the breadth of that well reasoned decision that has been accepted by every segment of the industry except those few seeking to preserve a basic illegality in any manner.

share of the blended uniform minimum price adjusted only for the statutory differentials."

Both the *Blair* and *Allen* courts also noted that a consideration involving compensation of nearby producers for the loss of their alleged special share of the fluid milk market "is not affirmatively authorized by this statute which precisely circumscribes the power of the Secretary of Agriculture. On the contrary, this is exactly the approach the Congress intended to prohibit." Clearly, it is no answer to say that nearby producers received higher prices at some time prior to the Act, for the acceptance of petitioners' contentions that such producers should retain the allegedly higher prices would rewrite the Act to substitute a lack of uniformity for the specified uniform price requirement. The statute provides for uniform minimum prices, not for varying non-uniform "historical" prices, and any argument concerning preservation of the "status quo" in such regard would nullify the uniform price requirement of the Act even if consideration of the use of a producer's milk did not formulate the basis for the nearby differential.

Moreover, the acceptance of the petitioners' argument would actually result in the non-nearby producers receiving a surplus or Class II "historical" price for their milk, in that it is an indisputable fact that all producers were receiving depressed prices at the time of the passage of the Act, this being the very factor that led to its enactment. The petitioners' citation of "historical" prices for a period long prior to the Act and before various technological and transportation improvements made inroads upon protected markets are obviously irrelevant to the situation existing at the time of the emergency legislation. Indeed, even in his recent decisions extending federal regulation and the nearby differential to the markets adjacent to that embraced in the Greater Boston milk order, the Secretary has consistently found that it was the nearby

producer who clamored for a federal order because he was losing his market to more distant dairymen and the local milk was often disposed of as manufactured or surplus milk at Class II prices.[46]

Thus, the plain and mandatory language of the Act is deliberately ignored in violating the very purpose of the legislation, for the Secretary's findings acknowledge not only the exception to the required uniformity of price but grounds it upon the prohibited consideration of use of a producer's or group of producers' milk. Further, at the same time that the Act is intentionally violated in its most fundamental and mandatory provision, the Secretary also indicates an awareness of the reasons that gave rise to such uniform price requirement and the need for federal regulation, in that his findings acknowledge that under a regulated market the nearby producer "obtains the benefit of an established Class I price which may be higher than in the absence of regulation and has the assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources." Indeed, the Secretary stated as follows concerning the nearby milk in his Southeastern New England decision that sets forth his rationale for violating the Act in favor of producers "in the States of Massachusetts, Rhode Island and Connecticut":

> "More than one-third of the fluid requirements for the Southeastern New England area originates from sources outside the States of Massachusetts, Connecticut and Rhode Island. (A. 340) . . . Less than one-third of the fluid requirements of Rhode Island dealers are supplied by Rhode Island dairy farmers. An additional forty-five percent is supplied by dairy farmers located in nearby

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[46] 23 Fed. Reg. 8226-27; 14 Fed. Reg. 7085; 14 Fed. Reg. 7098 and 29 Fed. Reg. 11208.

Massachusetts and Connecticut and the remainder is secured from other sources, primarily from the States of Vermont and New York. (A. 342)... Relatively large quantities of local producer milk were dropped during the latter months of 1957 and early 1958; in some cases entire pickup routes were dropped at one time. (A. 342)... Registered Rhode Island producers have enjoyed a preferential market over an extended period of years. The allocation program and the procedure employed by the responsible officials of the State in issuing permits for importation of non-registered milk have tended to maintain such preferential market to the detriment of other dairy farmers whose production is an essential part of the market supply. (A. 343) . . . The overall Class II utilization for the market is only 5.8 percent of the total market utilization and less than 10 percent of receipts from registered producers which, from experience in other federally regulated fluid markets, is substantially less than the necessary reserve which a market such as Rhode Island must carry to assure a continuing adequate supply to meet daily and seasonal fluctuations in supply and demand. Hence, the market relies primarily on up-country unregulated supplies and surrounding Federal order markets to provide the necessary reserves. (A. 343) . . . The Southeastern New England market is a deficit market and must rely on sources of supply in northern New England and New York to supplement the local supply. (A. 344) . . . The marketing situation as it now exists constitutes a serious and continuing threat to the stable and orderly marketing of milk and to the maintenance of an adequate supply of pure and wholesome milk for the Southeastern New England marketing area. (A. 345) . . . "

In respect to the Massachusetts producers located in the Southeastern New England area, the Secretary also found in his 1958 decision that, "Much of this milk is sold at manufacturing milk prices even though the local milk supply is inadequate to meet market demands." (A. 341).

The same findings were made by the Secretary in 1949 in issuing a Federal Order and a nearby differential for the Springfield, Mass., marketing area. Approximately 40 percent of the producers regularly serving that market were located outside of the state of Massachusetts (A. 331), and "the sources of milk supply for the various cities and towns in the proposed marketing area overlap and are intermingled to such an extent that the general supply area may be considered as one milkshed for the entire marketing area." (A. 333). In spite of the preferential prices which handlers were *required* to pay to local producers under regulations of the Massachusetts Milk Control Board (A. 332), the Secretary found that:

> " * * * The evidence in this record shows the need for Federal regulation of all the sources of milk supplies for the Springfield market in order to give Massachusetts producers who are now supplying the market an opportunity to retain the market *on an equal basis* with out-of-state producers. (A. 331) . . . The record shows that conditions exist in the Springfield market which have resulted in a loss of market for several producers. (A. 331) . . . the lack of a uniform marketwide price plan for all producers supplying the market is a disrupting factor. (A. 333). . . . The lack of price regulation effective with respect to all of the sources of fluid milk for the Springfield market and the absence of a uniform pricing method are contributing to the growth of an unstable milk market in this area. A marketing order is needed to assure producers of a market

for their milk at reasonable and uniform prices." (A. 333). 14 Fed. Reg. 7085, Nov. 23, 1949.

Virtually identical findings were made by the Secretary in his decision, 14 Fed. Reg. 9097, of the same date, November 23, 1949, promulgating a Federal order and nearby differential for the Worcester, Mass., marketing area. (A. 336-39).

The Secretary's decision, 29 Fed. Reg. 11205, of August 4, 1964, consolidating the aforesaid three milk orders with the Boston order to form the Massachusetts-Rhode Island Order[47] stated that "distinguishable markets for milk in most of eastern Massachusetts and Rhode Island no longer exist (A. 346) . . . It is clear that a single marketing area has developed where previously separate markets existed. Under this circumstance, the economic stresses, marketing instability and price uncertainties which have developed and persisted must be eliminated by the adoption of a single milk order with a single marketwide pool." (A. 347)

The Secretary's decision further noted that "recently much of the locally-produced milk has had to be disposed of in manufacturing channels." (29 Fed. Reg. at 11208, 3rd column, 1st para.)

Although the Connecticut Order was not consolidated into the present Order in 1964, the Secretary's decision of February 11, 1959, 24 Fed. Reg. 1049, promulgating the Connecticut Order and nearby differential contained very similar findings. 24 Fed. Reg. 1050.

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[47] Mergers of milk marketing areas and orders are becoming commonplace as the population increases and the suburbs expand. The Eastern Ohio-Western Penna. Order was merged with the Clarksburg W.Va., order on May 1, 1969. Merger of the Philadelphia Order with two other orders is presently under consideration by the USDA.

All of the foregoing findings relating to the loss of a market by nearby producers and the use of their milk for Class II or manufacturing purposes are not only inconsistent with the issuance of any price preference to nearby producers, particularly on the basis of the use of their milk for fluid purposes, but are also indicative of the reason for referring to the "historical" use of nearby milk in issuing a nearby differential. However, as the *Blair* court correctly noted, the Act does not allow payment of non-uniform "historical" prices to certain producers on the basis of the "historical" use of their milk but, indeed, requires the payment of uniform prices to all producers irrespective of the use of their milk historically or potentially.

Moreover, even if a few producers did receive a higher price for their milk long prior to the Act or federal regulation of a particular market, they certainly had no lien or property right to the fluid milk market. Whether nearby or non-nearby producers, they obviously could not corner it and hold it either against other producers or the power of the Congress to control the industry as it affects interstate commerce and the public interest.[48] Nor could the handlers with fluid milk outlets make a similar claim of a monopoly over the fluid milk sales. It must also be remembered that many non-nearby dairy farmers possessed preferential price positions over other producers by virtue of fluid milk outlets and they *opposed* federal regulation for this reason. Some served the same handlers as the nearby producers, and other non-nearby producers in various parts of the milkshed had made heavy investments to acquire a fluid outlet for their milk.

For instance, the Bellows Falls Cooperative Creamery of Bellows Falls, Vermont, composed of non-nearby producers,

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[48] Secs. 601; 602; 608c(5)(B), (D) and (G).

was *opposed* to marketwide pooling unless its producers would get the benefit of base-rating reflecting their lack of surplus. This organization had a direct outlet for its members' milk with stores in Boston, and it took care of any surplus by selling it as cream through such outlet.[49] The association maintained that the property interests of its members would be jeopardized by marketwide pooling wherein the surplus of other groups would simply be borne by the pool rather than the producer himself or his association. The Milton Cooperative Creamery of Milton, Vermont, was of the same view, for this association also owned its own country plant facilities.[50] Moreover, its members had bought an interest in a business in Boston through which their milk was marketed. Instead of selling milk to dealers, the association marketed its milk through a city distributing plant of which its members were part owners. The Secretary acknowledges that the Congress did not write the legislation to retain the historical preferential price position of these producers or groups of producers over others in the milkshed, and it is equally clear that the Congress did not engraft any exception of this nature in favor of a particular group of "nearby" producers who were benefitted by the Act and federal regulation as much, if not more, than any other producers.

The correctness of the holding of the court below in both *Allen* and *Blair* concerning the Secretary's inability to amend the Act by giving consideration to "historical" price relationships or preservation of the "status quo" in favor of certain producers is illustrated by the case of *H.P. Hood & Sons v. United States,* 26 F. Supp. 672,

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[49] Report of the FTC on the Distribution of Sale of Milk and Milk Products, Boston, Baltimore, Cincinnatti and St. Louis, H.R. Doc. 501, 74th Cong., 2nd Sess. (June 4, 1936), p. 27.

[50] *Ibid.*, p. 22.

affirmed 307 U.S. 588 (1939). The district court in the *Hood* case allowed a producer to intervene for his class on the side of the handler, Hood & Sons, and a second producer was allowed to intervene on the side of the Whiting Milk Company, a handler that was also sued by the United States to enforce the Greater Boston milk order, 21 F. Supp. 321 (D.C. Mass. 1937), the said cases having been consolidated subsequent to the latter decision. The intervening producers maintained that their respective handler had a higher Class I utilization than the average of the other handlers in the market, and both the handlers and the producers challenged the marketwide equalization pool which resulted in a lower price to such producers than that which they had received prior to the Act.

The intervening producers' arguments concerning entitlement to such "historical" prices were fully considered by the district court, and its excellent opinion noted that their rights to such prices were contingent upon the unconstitutionality of the Act.

Of especial significance is the fact that the intervening producers in the *Hood* case were non-nearby producers, the main intervener being from the State of Vermont, and this clearly indicates that many non-nearby producers also possessed preferential fluid milk outlets and "historical" higher prices prior to the Act. The "nearby" producers plainly have no greater right to the retention of a preferential price position than do non-nearby producers. Moreover, said intervening producers continued in the *Hood* case when it was presented to this Court, and their arguments were summarily rejected by this Court with the terse comment:

> "Other contentions are made which have been considered but which do not seem to require any statement. Affirmed."

This Court also rejected the analogous arguments of the handlers that the payment of the excess of their sales over and above the uniform blended price into the marketwide equalization pool or producer settlement fund for transfer over to other handlers *and the latter's producers* violated the constitutional rights of the handlers *who disposed of their milk for Class I or fluid use.* The Supreme Court noted the obvious fact that such handlers were required to pay only *minimum* prices according to the nature of their sales, and that they had no interest in the pool or fund to question disbursements therefrom. If handlers with a high fluid utilization could not pay their own producers on the basis of the excess of their sales over the uniform blended price, then it is clear the producers with such "historical" fluid milk outlets may not demand payment on such basis through a differential deduction from the equalization pool prior to computation of the uniform blended price. If a differential may be employed to obtain or retain a larger share of the fluid milk market and price for certain producers, then it is evident that such a differential predominates over not only the uniform price requirement but the Act itself.

It is important to realize that the arguments of handlers and those producers who received higher prices *prior to the Act* were in opposition to the equalization and uniformity required by the Act, whereas the arguments of these ineligible or non-nearby producers concerning violation of their statutory and constitutional rights are grounded *upon the Act.* The respondents acknowledge the constitutionality of the Act and its fundamental purpose to secure to all producers "the right to be paid a minimum price." *Stark v. Wickard,* 321 U.S. 288 (1944). Indeed, respondents maintain that nearby producers have no standing to intervene herein to either claim a payment over the minimum price or to oppose lawful competition under a government program.

Additionally, it is evident that price is also contingent upon the use made of the milk.[51] and any attempted justification on the "historical" higher-price theory would necessarily constitute an impermissible use criterion condemned by the Act. This relationship of price to use is acknowledged by the Secretary's finding in promulgating the very first Boston milk order on February 9, 1936, when nearby producers were given a fluid or Class I price for all of their base milk because of "the greater availability of their milk for Class I use" (A. 224), the non-nearby producers being forced to accept a composite or blended price that carried the surplus of the market under a clearly illegal "base-rating" plan.[52] The only finding made is issuing the first nearby differential provision in the Greater Boston milk order of August 1, 1937, indicates that the Secretary did not deviate from the illegal use criterion, in that he merely substituted the nearby differential provision for the Class I base-rating previously awarded to the preferred nearby producers. (A. 224).

When the issuance of the nearby differential that varies the uniform minimum price is grounded on the past use of the milk of certain producers, it is clear that the illegal result has been obtained on an equally illegal basis. Even the price statistics cited by the petitioners are not only irrelevant for the reasons heretofore related but are also invalid as evidence because of their admitted relationship to the fluid use of nearby milk.[53] Nor may the Secretary preserve such relationship by artificial regulations and then cite such resulting statistics as continuing justification for the differential.

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51 *United States v. Rock Royal,* 307 U.S. 533.

52 608c(5)(B)(ii)(d).

53 *H. P. Hood & Sons v. United States,* 26 F. Supp. 672, *affirmed,* 307 U.S. 588.

Clearly, the consideration of such past price preferences and the use of milk of a certain producer or group of producers may no more be a valid justification for a variance from the uniform price required by the Act than can the present or future use of milk of certain producers:

> "We hold that, irrespective of motive, the Act forbids consideration of the use to which the milk of a particular producer or class of producers is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers."[54]

Moreover, the operation of the nearby differential of this milk order is geared to the use of milk and the Class I price in the same manner as the nearby differential of the N.Y.-N.J. Order invalidated in *Blair*. However, its financial impact on the non-nearby producer is far more discriminatory and vicious than the one in *Blair* where the nearby differential rates were subject to a formula which reduced the rate of payment to nearby producers when they increased their production by a specified amount. Also, the nearby differential payments were not made in any amount under the N.Y.-N.J. Order when fluid utilization in the milkshed reach 80 percent of the total regulated milk. Although the amount of the nearby differential payments under the Mass.-R.I. Order vary inversely with the fluid utilization in the market, being paid at the rate of 46 cents per cwt. *or such lesser amount as will equal the Class I price,* the differential payments would

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[54] *Blair v. Freeman,* 370 F.2d 229 (1966) at p. 236; *Freeman v. Allen,* 402 F.2d 660 (1968).

not be terminated when fluid utilization reaches 80 percent of the total milk but would be paid in successively decreasing amounts until there was 100 percent fluid utilization in the market. Further, the nearby producers' production and rate of differential payment are not contingent upon each other, and the nearby producer may increase his production at will, for his rate of nearby differential payments is higher when the surplus in the market is the greatest. The non-nearby producer is thus protected least when the need therefor is the greatest and has no protection against an increased surplus in the market, whether brought on by increased production of nearby producers or enlargement of their numbers. The non-nearby producers must bear an additional part of the surplus of the market by virtue of this aspect of the nearby differential which burdens him with the normal surplus of the market by its existence and operation.

As in *Blair*, such deduction of the nearby differential payments from the marketwide equalization pool reduces the uniform price and diverts a part thereof from the non-nearby producers who are supposed to receive a uniform minimum price without a prior deduction constituting an apportionment of the use value of the marketwide equalization pool. Contrary to the prohibition expressed in the Act, the nearby differential either perpetuates or creates payment based on use of milk of nearby producers. It accords to them the Class I or fluid milk price, or a larger share of the same, rather than a uniform minimum price, and to the non-nearby producers the burden of carrying the surplus of the market through a non-uniform price. The petitioners contend that the unauthorized nearby differential takes precedence over the requirement of a uniform price to all producers for all milk delivered to all handlers irrespective of the use of a particular producer's or group of producers' milk. The respondents maintain that the entire rule and command of uniformity is devoured by the exception thereto, and that

the Congressional intent and purpose is completely frustrated and violated by the nearby differential provision.

If the petitioners' contentions are properly understood, it would appear that they maintain that the "irrespective of use" language of the Act serves merely to distinguish between an individual-handler pool and the marketwide equalization pool and does not constitute any prohibition against considering the use which is made of the milk of a particular producer in paying him the "uniform" price under marketwide pooling of milk. This contention, of course, is a complete inconsistency and obvious self-contradiction, for one can hardly pay a uniform price and at the same time a price that is based on use made of the milk of the particular producer. It is tantamount to saying that a producer may be paid on the basis of the use made of his milk and thus need not be paid the uniform price required by the Act under marketwide pooling.

In a futile attempt to extricate themselves from the plain language of the Act, the petitioners argue backwards that, since the "irrespective of the use of such milk by the handlers" does not appear in Section 8c(5)(B)(i) describing individual-handler pooling, "the absence of that verbiage with respect to an individual-handler pool would dictate that no such strict price uniformity is required for producers covered under such a pool." (Brief of Zuber, page 38). However, petitioners conveniently overlook the fact that no such language is required in the individual-handler pooling provision because it specifically provides "for the payment to all producers and associations of producers delivering milk to the *same* handler of uniform prices for all milk delivered by them." In other words, each producer serving the same handler is paid a uniform price based upon the average use made of the milk of all producers serving such handler, and this elementary fact was acknowledged in the Secretary's brief filed in the *Blair* case:

> "Under a marketing order providing for 'handler pools' rather than marketwide pools, the utilization value of the milk disposed of by each handler is computed separately. The producer's minimum return is based on his own handler's average uses rather than the average uses of the market as a whole. This form of regulation does not involve a producer settlement fund since the individual handler's uniform minimum payments to his producers will coincide with the total utilization value of the milk received from them." (Brief of Secretary, p. 13, ft. 13, in *Blair*, filed as exhibit below).

Followed to its illogical conclusion, the petitioners' contention appears to be that under marketwide equalization pooling the Secretary may not consider the average use made of milk by the individual handlers in computing the average or uniform marketwide price because of the "irrespective of the uses made of such milk by the handlers" language, but that he may consider the use made of the milk of the individual producers in making payment of "uniform" prices to them. The situation is actually just the reverse, however, and petitioners understandably suggest no other basis for computing the marketwide uniform price and, indeed, their contentions embody a nullification of the language of the Act providing for uniform prices and the complete elimination of at least that part of the Act providing for marketwide equalization pooling of milk.

The petitioners' contentions also appear to embrace a repeal of the individual-handler pooling provision of the Act since there would be no reason therefor if each producer could be paid on the basis of the use of his particular milk rather than on the basis of the average use made of all of the milk of all producers serving the same handler.

Recognizing their dilemma in this respect, the petitioners are then forced to argue, although completely irrelevant to the issue of uniform prices under marketwide equalization pooling of milk, that the Secretary has the power, never exercised, to authorize payment to producers based upon the use of their milk under Section 8c(5)(A) of the Act. That provision, however, authorizes the Secretary to classify milk according to the form in which or the purpose for which it is used and to fix, or provide a method of fixing, minimum prices for each use classification which all handlers shall pay for milk purchased from producers and associations of producers. If this complementing provision was not in the Act, there would be no way to effectuate Section 8c(5)(B) of the Act which is conditioned upon (A) in providing for the two alternative methods of payment to producers. ("(B) Providing: (i) . . . ; or (ii) . . . "). Further, the introductory language of Section 8c(5) says that orders issued pursuant to this section shall contain "one or more of the following terms *and* conditions, and (except as provided in subsection (7) of this section) no others." The quoted language does not say, as petitioners would have it, "one or more of the following terms *or* conditions", and the Secretary is clearly authorized to include in an Order one or more terms and one or more conditions. Moreover, the words "one or more" were inserted before "of the following" in order to negate any possible interpretation that an Order had to contain all of the terms and conditions of Section 8c(5). Significantly, the petitioners admit that the Secretary has never acted in conformity with such a contention which is advanced for the first time in this Court. Although the point is an irrelevancy, we are unaware of any instance wherein the Secretary's interpretation of his own power and the Act have not been in disharmony with the present contention.

It is also significant that the Congressional reports speak of only two alternative methods of payment to

producers, that of marketwide equalization pooling and individual-handler pooling of milk. Although the price paid by different handlers may vary somewhat under individual-handler pools, it is crystal clear that the Congress was still motivated by principles of uniformity in authorizing such method of pooling. Individual-handler pooling of milk requires *individual* approval by at least *three-fourths* of the region's producers in a referendum *on this issue alone,* but marketwide equalization pooling may be approved by only two-thirds of the producers and their votes are cast for them by their cooperative associations on that provision and the milk order as a whole. It would be a complete inconsistency for the Congress to include such limitations in regard to individual-handler pooling that are "intended to safeguard the exercise of and prevent abuses in the application of the regulatory power conferred upon the Secretary"[55] and at the same time deprive the producers of all protection by giving the Secretary unbridled power to authorize payment based upon the use of their particular milk by the handler. If the petitioners' contentions were not meant to go this far and they mean that each producer serving a particular handler would be paid an average or uniform price under the alleged authority of Section 8c(5)(A), then it is plain such method is duplicative of that provided for in Section 8c(5)(B)(i) relating to individual handler pooling and that the Secretary may not deprive producers of their statutory rights and the protection specifically provided for by the Congress in order to insure the principle of uniformity of price irrespective of use of milk.[56]

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[55] H.R. Rep. No. 1241, p. 2; S. Rep. No. 1011, p. 3.

[56] The Secretary also has a third option under Section 8c(7)(A) which authorizes him to stabilize the prices of milk in regulating handlers by "(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof."

It might also be mentioned that the Secretary's decision promulgating this Order recognizes the uniformity contemplated even under individual-handler pooling in stating that, "Individual-handler pools generally are more practicable for markets where milk supplies are short and where reserve supplies are distributed rather evenly among all handlers serving the market." (A. 358-59).

The respondents submit that petitioners' contentions are thus not only irrelevant but also totally unsound, irrational, inconsistent and self-contradictory. They would amount to not only a nullification of Section 8c(5)(B) but of the Act itself. They would revive all of the self-defeating competition among producers and facilitate a situation wherein the Secretary would be additionally prevailed upon to foster monopolies over the fluid milk market with resultant injury to most producers and the higher prices for consumers that inevitably accompany such monopolies. Most handlers and producers would be driven from the market in short order, and it is clear that the Congress did not intend to preserve the unstable marketing and demoralized prices that petitioners' contentions would revive by attributing such power to the Secretary and such intention to the Congress. The judicial validation of the nearby differential would constitute judicial legislation and undo the work of the Congress. It would open the floodgates to the issuance of similar discriminatory differentials in virtually every milk order across the country and encourage its insertion in orders relating to other commodities. The uniformity and stability envisioned by the Act would be replaced by non-uniformity and disorderly marketing resulting from political expediency and group pressures for similar preferential price treatment, a fact that is evidenced by its insertion into other milk orders because it existed in the Boston milk order on a supposedly temporary basis. Discontent and unrest among producers would prevent harmonious relationships and preserve the jealousies, rivalries, and differences

that currently exist among various cooperative associations that inure to the producer's common disadvantage.[57] The issuance of similar discriminatory price concessions would engulf the producers in widespread and costly litigation.[58] The lack of uniformity and resultant failure to share the burden of surplus necessary to an adequate supply of milk would precipitate cut-throat competition leading to disorderly marketing.[59] Plainly, the Congress acted to put an end to such unsettling conditions and competition that plagued the markets and which would be revived by validation of a differential that gives a competitive advantage to the most influential group of producers:

> "The short answer is that Congress was well aware of the 'competitive conditions' in this industry, and clearly intended to override them. For the general welfare of all, it decreed that some producers might have to forsake their peculiar advantages, by requiring that uniform prices be paid to all producers, *subject only to a few narrow and well defined adjustments.*"[60]

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[57] Some cooperative association employees and officials favor the nearby differential for the reason that its termination might result in a loss of some of their members to other associations and a loss of dues income to the association.

[58] Petitioners Zuber, *et al.*, actually admitted this obvious fact in attempting to rebut the same with an inaccurate citation of one case that has nothing to do with this litigation.

[59] *Blair v. Freeman,* 370 F.2d 229. Compare *Cranston v. Freeman,* 290 F. Supp. 785, which appears to proceed on the basis that the Congress authorized a monopoly over the fluid market for one group of producers in order to eliminate competition by other producers who regularly supply the market's needs.

[60] *Blair v. Freeman, supra.*

2. The nearby differential is not an authorized adjustment to the uniform price.

"MR. JONES: *The provision with reference to orders plainly states that in the case of milk and its products orders may contain the following conditions and none other. I think that is just as clear as it can be.*" (79 C.R. 9572).

After concluding that the Congress, as well as this Court and every other court except the *Cranston* court, was in error and that the plain language of the Act does not really mean what it says concerning uniformity of price irrespective of use of a producer's milk, the petitioners then acknowledge that they still must find a specifically authorized basis for the promulgation of the nearby farm location differential.

Section 8c(5)(B)(i) and (ii) of the Act provide that the uniform price under both individual handler and market-wide pooling of milk is subject, "in *either* case, *only* to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year . . . "

A proper understanding of the *authorized* differentials or adjustments reveals that they strengthen and underscore the requirement of uniformity of price irrespective of the use of a producer's milk.

The authorized adjustment in subsection (b) for the grade or quality of the milk delivered is reflected in the butterfat differential of the milk order,[61] and it is significant that any dairy farmer is free to improve the grade or quality of his milk in order to obtain a higher return therefor through the butterfat differential. All milk in the milkshed is subject to the same high sanitary health standards, and it is therefore available for fluid use irrespective of the situs of production, a fact which is apparent from the limited supply produced in the nearby areas. It is clear that the nearby differential may not be predicated on such basis, and an excellent article by the Assistant General Counsel, USDA, entitled "*The Pricing of Milk Under Federal Marketing Orders*", 26 G.W. Law Review 180 (1958), states in part as follows:

> "The entire supply of milk which is approved by the health authorities for fluid use in a particular marketing area is fungible and homogenous. There is no discernable basis for selecting out of the approved supply one producer's milk rather than that of another for sale on the fluid market, and also a particular producer's milk cannot be distinguished in a milk plant from that of another. All of the milk approved by the health authorities for the fluid use in a particular marketing area is available for disposition on the fluid milk market. A satisfactory stabilization of prices for

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61 7 C.F.R. 1001.71

fluid milk requires that the burden of surplus milk be shared equally by all producers and distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor."

The adjustment authorized under subsection (c) for "the locations at which delivery of such milk is made" clearly refers to the transportation costs[62] involved in hauling the milk from the place where it is delivered to the handler to the city distribution or processing plant. The cost of transporting milk necessarily enters into the price thereof, and the transportation differential is found in Section 1001.62 of the Order where it is combined with the market differential and collectively designated as the plant zone differential. As previously explained, all milk in the milkshed is produced for the fluid market, and the cost of transporting the milk is thus based on the mileage from the receiving handler or plant at which the milk is delivered to the principal consumption center for the regional marketing area.

Although promulgated as a "location" differential, the farm location differential is certainly not authorized under subsection (c) as an adjustment to the uniform price for "the locations at which delivery of such milk is made." The nearby and the non-nearby producers may deliver their milk to the identical spot, but only the nearby producer receives the differential payments, and this varying price treatment clearly evidences that the nearby differential payments are not based on the place at which delivery of milk is made as required by the statute.

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62 "Minimum prices fixed in such orders are required to be uniform as to all handlers, subject to adjustments for differentials in the grade and quality of the milk delivered, *for differences in transportation costs from the place at which delivery is made to the handlers to the distributing* or porcessing plant, and . . . ." H.R. Rep. No. 1241, 74th Cong., 2nd Sess. (1935).

Moreover, the nearby producer may deliver his milk any place in the milkshed and still receive the nearby differential payments, such blanket eligibility for the differential payments hardly being related or based on the different locations at which delivery of milk is made as contemplated by the Act. Such an interpretation obviously gives no consideration to the locations of delivery and is totally inconsistent with the defined differential because it is concerned only with the identity of the recipient of the differential payments and not the locations where he and other producers deliver their milk. Indeed, the nearby producer receives such differential payments even if he delivers his milk 200 miles from the city market,[63] whereas the non-nearby producer is not eligible therefor even when he delivers his milk to the market center. Instead, he must dig down and pay a part of his uniform minimum price to the nearby producer. Clearly, the nearby producer need do nothing to receive the differential payments and the non-nearby producer can do nothing to acquire the same or to avoid such exaction from his milk price, other than to move the location of his farm. He is thus effectively precluded from ever obtaining or avoiding the nearby differential payments, irrespective of where he or the nearby producer deliver their milk. The lower court correctly noted

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63 "(Reginald) Bird pointed out that no matter what radius was selected, there would always be nearby producers who would be delivering to handler's plants located outside the official market area. . . " (A. 631); "Deliveries to plants located within the zone was omitted as a condition and the differential was thereby converted into one depending solely on farm location. These producers could deliver to more distant plants and still receive the differential , . . . " (A. 635); see also testimony at A. 237 relating to non-delivery by nearby producers and real reason for preference by AAA in 1935, as well as A. 633, 698.

that the gearing of the differential to the situs of production rather than to the place at which delivery of the milk is made would forever fasten such tribute payments upon the non-nearby producer.

Nor may petitioners seriously contend that the nearby differential qualifies as the location differential authorized "for the locations at which delivery of such milk is made" because delivery has always taken place at the farm. This would allow a double or duplicate payment on the basis of the same factor, for the authorized location adjustment is already in the Order as the transportation differential that compensates the nearby producer for the location value of his milk. The place of delivery, moreover, is determined under the location differential of the Order with reference to the location of the *plant* in the freight zone at which the milk is delivered[64] and not in respect to the location of a producer's farm. Significantly, the non-nearby producer still could not receive the nearby differential payments and would have to pay the same to nearby producers even if he delivered his milk to the same handler and plant or at a location adjacent to the nearby producer's farm, this fact conclusively demonstrating that the receipt of the differential payments is dependent upon the identity of the producer rather than on the locations at which the milk is delivered.

The fact that milk is now delivered long distances in refrigerated tank trucks over superhighways and the industry has otherwise progressed over the past 30 years indicates the inapplicability of petitioners' contention

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64 7 C.F.R. 1001.62: "Zone Differentials. The class prices and blended prices computed under 1001.60, 1001.61, and 1001.64 shall be subject to zone differentials based upon the zone location of the plant at which producer milk is received . . . "

that the differential can be justified because delivery takes place at the farm. The exclusion of non-nearby producers on such basis is even more inappropriate at this time because many non-nearby producers deliver their milk direct to the market center in order to receive the zone differential for transportation and direct delivery of milk, and they would also like to receive the nearby differential payments denied to them and which they are forced to pay to an illegally preferred group of producers in order to market their needed milk.

Although petitioners maintain that the farm was regarded as the place of delivery when the subsection was inserted into the Act on August 24, 1935, it is apparent that this contention is totally lacking in merit. The Congress could not have been thinking in such limited terms when it passed the 1935 Act for it also provided therein for the market differential that was paid to a producer for the direct-delivery of milk to a city market. If delivery was limited to the farm at that time, the Congress would not have provided for the market differential that recognizes a saving in handling costs when milk is delivered directly to a city market or plant rather than initially to a country plant for reshipment to the city market.

In apparent acknowledgement of the defects in their contentions, the petitioners then maintain that, as a practical matter, only the nearby producers could deliver to the city market in 1937 when the nearby farm location differential was first inserted into the Boston Order. Of course, the petitioners not only attempt to rewrite the Act by such a contention but also fail to recognize that the material cited by them makes reference to a much earlier period.[65] In fact, the first Greater Boston Order,

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[65] Much of the material cited was either printed, compiled or related to a period prior to the passage of the 1935 Act and is also irrelevant and inaccurately or selectively cited by petitioners.

effective February 9, 1936, included a differential of 21 cents per cwt. for delivery of milk within 40 miles of Boston by producers whose farms were located *more* than 40 miles from Boston. The 1937 Boston Order reduced this differential to 18 cents per cwt. but nonnearby producers were still able to obtain such differential by the direct delivery of their milk to a plant within 40 miles of Boston. The petitioners thus attribute a superfluous or ulterior action to the Secretary in promulgating the 1936 and 1937 market differential that included the non-nearby producers within its terms in respect to payment for direct delivery of milk, and it is clear that the Secretary may not disavow or discredit his own regulations 30 years after the fact. His own action in promulgating the market or direct-delivery differential in the various milk orders, including those for secondary markets, indicates agreement with the Congress that the farm is not in any way related to the location at which delivery of milk is made.

Nor does reference to the old New York federal order of 1938 assist petitioners. The differential there was not only distinct from the present one but was also grounded upon *delivery* of milk to *plants* within the designated area. Article VII, Section 2, of the 1938 New York Order, reproduced in footnote 14 of the Court's opinion in *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939), is entitled "Minimum Prices" and specifically states that, "Payment of the minimum prices for milk received *direct* from producers shall be in accordance with Article VII. That Article provided for payment of the differential "in the case of *plants* located in the counties listed in paragraph 8 of section 1 of Article VI", and the latter provision referred to "*all* net pooled milk received from *producers at plants* in the counties or portions of counties listed below in this section."

Even as early as 1931, long before the first Act was passed and six years before the issuance of the first nearby farm location differential in the Boston Order of August 1, 1937, much of the milk for the fluid market was shipped by tank truck, and this mode of transportation offered decided economies and advantages over shipment in cans or by rail. The percentage of milk shipped in such manner had steadily increased by 1937, and it was apparent that a differential based on the place at which the delivery of the milk was made offered no possibility of preserving the local monopoly or preferred price position of nearby producers over the fluid milk market that existed in the 1920's.[66] Further, Congress certainly recognized this fact and never intended to turn back the clock and progress for the sole benefit of the nearby producers, a fact which is aptly evidenced by the many provisions in the 1935 Act pertaining to uniformity, delivery, and the entry of new producers and production areas into a market.

The petitioners, however, attempt to avoid these obvious and admitted facts by attacking the lower court's statement that, "not until bulk tank trucking thereafter made it economically feasible for distant farmers to deliver in the city did the nearby farmers, for self-protection, insist that the nearby differential be based solely on farm location." But the petitioners understandably offer nothing to contradict this basic fact, for it would be irrational to contend that improvements in transportation and distribution of milk did not take place during the 1930's. Indeed, the petitioners clearly confuse bulk tank *trucking* to the city plant with the more modern practice

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[66] See Barriers To Internal Trade In Farm Products, A Special Report to the Secretary of Agriculture by the Bureau of Agricultural Economics, USDA, (USGPO-1935), p. 14, and quotation therefrom at pp. 19-20 of this brief regarding shipments by tank truck.

of installing a bulk tank right on the farm and with other technological improvements in bulk tank hauling of milk.[67] A 1936 Report of the Federal Trade Commission to the Congress, H.R. Doc. 501,[68] cited by petitioners, clearly discloses the correctness of the lower court's observation concerning milk shipments in tanks instead of cans and by truck rather than by rail during the period 1920-1931 for the Philadelphia milkshed, the below-listed table of tank truck shipments being taken from the publication of The National Milk Producers' Federation, History Series No. 3, October 1, 1932, p. 31:

> "When country receiving stations were first introduced, milk was shipped to city processing plants in milk cans. The mechanical or physical loss, caused by milk adhering to the inside of the can and by spillage, was considerable but unavoidable.

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[67] The country milk, like the nearby milk, was originally delivered to the city market in cans which were iced to preserve the milk. The nearby milk could be delivered by truck and the country milk was usually shipped by rail. Tanks later replaced the cans in shipping non-nearby milk to the city, both by rail and by truck, and the milk was preserved by refrigeration. Farmers could band together to ship their milk by tank truck instead of delivering to a country plant where it would be reshipped by the handler by tank truck to the city market. Later, as petitioners note, bulk tanks to receive the milk were installed on farms and the cans were unnecessary for any purpose. The conversion to bulk tank storage on the farm is virtually 100 percent for the Mass.-R.I. market and 70 percent for the N.Y.-N.J. market, petitioners' federal register citation also referring to the R. I. market instead of this market.

[68] Report of the FTC on the Sale and Distribution of Milk and Milk Products for Boston, Baltimore, Cincinnati and St. Louis, H.R. Doc. 501 (1936).

"By far the major part of the shipments went via railroad refrigerator cars.

The development of *milk tanks* for railroad cars *and later for motor trucks, as good roads became more common,* decreased the mechanical loss in shipping milk, as less surface was exposed to the milk. In addition, the cost of washing the tanks was much less than washing the number of milk cans necessary to hold corresponding quantities of milk.

Milk shipped via railroad is unloaded at city railroad terminals and hauled by truck to the city processing plants. Milk shipped from the country station by motor truck, however, is unloaded directly at the city processing plants, and terminal costs, of course, are eliminated.

The introduction of milk tanks and the improvement of roads have made it possible for those Philadelphia distributors using them to decrease their costs of hauling milk from country receiving stations to city processing plants. The increase in use of motor trucks for hauling milk into Philadelphia and the decrease in use of railroads for this purpose since 1920 are clearly shown by the following tabulations:[68a]

[68a] Petitioners place great emphasis in alleging error upon a sentence in the lower court's opinion to the effect that "the differential was never one paid over and above the transportation differential available *to distant producers* who delivered to a nearby zone." Although the matter is of no great moment, the petitioners misinterpret the meaning expressed in such sentence by the lower court. The court simply stated that the distant producers who delivered to the nearby area never received any nearby differential, although they did receive the transportation differential, and the petitioners mistakenly enlarge the lower court's statement in alleging nonexistent error.

Trend of milk shipments into Philadelphia[1] 1920–31

Year	Percentage by trucks	Percentage by railroad	Year	Percentage by trucks	Percentage by railroad
1920	2.1	97.9	1926	29.7	70.3
1921	9.6	90.4	1927	38.6	61.4
1922	14.1	85.9	1928	50.7	49.3
1923	20.1	79.9	1929	51.4	48.6
1924	23.2	76.7	1930	51.7	48.3
1925	26.6	73.4	1931	55.3	44.7

"

Such improvements in transportation and other advances resulted in a much larger or alternative supply of milk being available to the handler, a situation which lessened the bargaining position of nearby producers. The differential for the direct delivery of milk was obviously not the type of differential that would result in a permanent return of any great extent and would actually encourage the elimination of any monopoly position enjoyed by nearby producers. As the amount of the market differential shrunk because of economies and improvements and as more distant producers were able to deliver their milk directly to the city markets, the nearby differential based on the location of the farm became the dominant differential provision. Handlers simply would not pay a large direct delivery differential when alternative supplies of milk were readily available, and the nearby differential was therefore fastened on the non-nearby producers by an influential group of producers located near the city who were backed by the Massachusetts Milk Control Board in refusing to equalize their production or to

otherwise enforce the federal program in a demoralized market. (A. 237, 405, 633, 675, 684).

It is apparent that the market differential for direct-delivery of milk provides no legal basis for the nearby differential. "The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant."[69] The direct delivery of milk to a city market rather than initially to a country receiving plant where the milk is cooled, tested, weighed, etc., and then shipped to the city plant or market, provides a service for which producers should be compensated. The double handling costs to the handler are thereby eliminated, and such market differential also tends to maintain uniformity among handlers as well as producers, in that it cancels out the added cost incurred by those handlers who maintain the country receiving plants for the actual benefit of the entire market and all handlers. Under the New York-New Jersey Order, this market differential is specifically referred to as a "direct delivery" differential. 7 C.F.R. 1002.71(c). Under other milk orders, such as the present one and the Connecticut Order, it is combined with the transportation differential and termed "plant zone differentials." 7 C.F.R. 1001.62, 1015.62.

The market or direct-delivery differential provides a service that is not limited to the primary market, and it was paid both prior and subsequent to federal regulation in many secondary markets. The fatal error of the *Cranston* district court decision is that it actually fails to realize that the Congressionally authorized and defined market differential is already in the Connecticut Order.[70] In fact,

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[69] H.R. Rep. No. 1241, p. 10; Sen. R. No. 1011, p. 10.

[70] See 29 Fed. Reg. 11211 wherein the Secretary discusses such differential in respect to both the Mass.-R.I. and the Connecticut

(cont'd)

this "customary market differential" was paid both before and after federal regulation was extended to the Troy and Albany, N.Y., area, the very area in which the *Cranston* court sat. 22 Fed. Reg. 4215 (1957). In spite of such fact, the *Cranston* decision omits the market differential in enumerating the differentials found in the Connecticut Order, and the Court thought that the plant zone differential of the Orders embraced only the transportation differential. Its decision presumably rests upon the testimony of witnesses who stated that such a market differential as was defined in the Congressional reports never existed in secondary markets. Of course, these witnesses could hardly admit the existence of the Congressionally authorized and defined market differential in the very area in which they testified or in respect to the Order there involved if their only hope of prevailing in that case lay in discrediting the Congressional definition in order to accommodate the nearby differential as the market differential.[71]

There is nothing in the Congressional definition of the market differential that limits it to the secondary markets, and it is now relegated to the primary market under federal regulation because of the factors of administrative

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70 (cont'd) Orders and explains that it refers to "the difference between costs incurred in the assembly of producer milk at country plants for transfer to city plants and cost incurred in receiving milk directly from producers."

71 The plaintiffs' attorney in *Cranston* filed a brief in the 1956 N.Y.-N.J. promulgation hearings for 24 dealers from the Troy-Albany, N.Y., area, and such brief dealt exclusively with the payments for direct-delivery in many secondary cities or markets in Upstate New York. Such brief, however, was never presented to that Court to rebut the testimony of witnesses that the defined market differential had never been paid in secondary markets.

convenience, ability of the handler to pay such differential over the minimum price as a premium without providing for the same in the regulations, improvements in distribution that have resulted from the closing of country plants and the lowering of the differential because of economies in operation, enforcement problems that would result from varying alternative supplies of milk available in different secondary markets, and the refusal of handlers to pay the differential under such conditions.

The nearby producer may deliver his milk to a country plant and still receive the nearby differential, and it is clear that such differential is not compatible with the market differential defined by the Congress and repeatedly recognized by the Secretary for the delivery of milk to a city market. Moreover, the non-nearby producers may not receive the nearby differential even when he delivers his milk to the center of the city market, for the nearby differential is based on the location of the farm rather than on the nature of the market to which a producer delivers his milk. The distinguishment between the two differentials could not be more apparent, particularly when each exists as a separate differential in the Order. 7 C.F.R. 1001.62, 1001.72.

Significantly, the Secretary's brief in the *Blair* case actually quoted the definition of the market differential contained in the Congressional Reports to show that the nearby differential could not be authorized under (a) as a market differential but only under (c) relating to the locations at which delivery of the milk is made. He there admitted that he had never promulgated any nearby differential under (a) as a market differential and even referred to the Boston Order nearby differential to substantiate his statements. The Secretary also admitted that the added value of nearby milk was attributable to fluid use of such milk, and the following excerpts from his brief are relevant hereto:

'Authorization for the promulgation of *location* differentials had its inception in the 1935 amendments to the Agricultural Adjustment Act of 1933. See 49 Stat. 750, 753. *By way of explanation,* the Committee Reports state:

> 'The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets. (H. Rept. No. 1241, 74th Cong., 1st Sess., p. 10; S. Rept. No. 1011, 74th Cong., 1st Sess., p. 10. See Rep. No. 1011, p. 10).'

"*From the foregoing we think it evident that Congress intended* by *location* differentials to compensate producers for the added value of their milk which is attributable to his 'distance from a primary market'. That, precisely, is the objective of the 'nearby differential' . . . Nearby differentials were considered justified principally because nearby producers historically enjoyed a greater percentage of the marketwide Class I sales (*hence they received more for their milk than did producers located more distant to the center of consumption*); . . . 7 U.S.C. 608c(5)(B)(c) was first enacted in 1935 by amendment to the Agricultural Adjustment Act of 1933 . . .

"The New York Milk Marketing Order, notwithstanding its early vintage, was not the first to recognize the need for nearby differentials; such adjustments were incorporated in the first Greater Boston Marketing Order promulgated on February

> 7, 1936 – less than six months after the enactment of the amendments to the Agricultural Adjustment Act which permitted adjustments for *'the locations at which delivery of such milk is made'*. See 2 F.R. 1331 . . . Indeed, the nearby differential provisions of the 1936[72] Boston and 1957 New York-New Jersey orders are, in substance, *identical in purpose and effect . . . Thus, dating almost to the very enactment of* 7 U.S.C. 608c(5)(B)(c) the Secretary has construed *that* provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. *It is, of course, axiomatic that such a long-standing contemporaneous administrative construction of the Section by the official charged with its administration is entitled to great weight ....* Finally, while we think that 7 U.S.C. 608c(5)(B)(c) plainly permits differential payments to nearby producers, the authority to promulgate such differentials is certainly to be found in 7 U.S.C. 608c(7)(D), which authorizes such other terms and conditions in addition to those expressly stated as are 'incidental to, and not inconsistent with the terms and conditions specified in subsections (5)-(7) . . .' As we have shown, the nearby differential provided for in the 1957 New York Order, in substance, is *identical* to a similar provision in the 1936 Boston Order – *both provisions were promulgated on the basis of the same statutory provision; . . .*

The fact that the nearby differential existed in a few orders because of its unauthorized inclusion in the 1937 Boston Order might have resulted in its being referred to on occasion as a "market" differential, but this did not make it the market differential authorized by the Act.

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[72] The Secretary's brief apparently refers to the 1936 Boston Order in error, for 2 F.R. 1331 relates to the first nearby differential promulgated on August 1, 1937 *after* the re-enactment of the Act. They appear to repeat this error in their brief filed in this Court.

The Secretary's "long-standing contemporaneous administrative construction" of provision (c) makes this crystal clear. Moreover, it is a legal impossibility for interested witnesses to reject, rewrite or replace the Congressional legislation and reports, the decisions of the Secretary, the admissions made in his aforesaid brief, or the testimony and other evidence in administrative proceedings upon which the Secretary acted in promulgating the nearby differential. "The administrative findings should be tested by evidence the administrator heard, not by *de novo* proceedings in a reviewing court." *Brannan v. Stark*, 342 U.S. 451. The *Cranston* court committed clear error in admitting the testimony of interested witnesses to overcome or replace the administrative record, and the general rule is also stated in *Wawa Dairy Farms v. Wickard*, 56 F. Supp. 67:

> " . . . the determination whether the Secretary's ruling is in accordance with law is based upon the record before him rather than upon a trial *de novo*. If the motion for summary judgment were denied and the case proceeded to trial, the identical record would then be before the court and nothing else."[73]

Additionally, the very fact that provision (a) refers to three different differentials discloses the irrationality of maintaining that the market differential definition in the Congressional reports is illustrative in nature and that such differential was meant to embrace any differential in any market. If this was intended there would be no necessity for enumerating and defining the other specific differentials.

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[73] As to the appropriateness of summary judgment concerning a question of statutory authority of the Secretary, see *Lehigh Valley v. United States*, 307 U.S. 76, *Knudsen Bros. Dairy v. Freeman*, (2 C. 1962), 303 F.2d 886, *N.Y. Guernsey Co-op. v. Wallace*, (D.C. N.Y.) 28 F. Supp. 590, *Blair v. Freeman*, 370 F.2d 229, all of which were heard on motions for summary judgment.

In spite of these elementary facts, the *Cranston* court did hold that the market differential was meant to embrace any type of differential, basing its decision on the testimony of an interested attorney, Reuben Hall, associate counsel in *Blair* and this case with petitioners' attorneys. Attorney Hall and one Donald Kane, former attorney for the National Cooperative Milk Producers Federation of Washington, D.C., in the 1930's, testified that they drafted the 1935 Act by submitting a draft in the name of the NCMPF to the Agricultural Adjustment Administration for transmission to the House Agricultural Committee. However, no documentary evidence of any nature, not one shred of paper, was produced to substantiate their contentions, although the draft to which they referred in their testimony was available if they desired to produce it for the court.

The NCMPF draft to which they referred in their testimony but understandably never produced in corroboration thereof actually distinguishes the market differential even more than does the Act, if that is possible, for it included the language, "volume, market or production differentials *or other differentials* customarily used in the market covered by the order." The Congress refused to authorize "other differentials" in limiting adjustments to *only* those enumerated and *no others.* Moreover, an examination of said draft discloses that it provided for the elimination of the individual-handler pooling provision which the Congress has included in the Act, a fact that would also cast some doubt on the testimony of witness Hall that he, rather than the Congress, "drafted" the 1935 Act and that his intent should predominate over that expressed in unambiguous terms by the House and Senate. Said witnesses also testified that they came up with the "market differential" language "on the last day", June 14, 1935, and that it was included in the draft and introduced the next day by Representative Jones, the witnesses then contending that the Congressional reports were

"hastily prepared" and that the definition of the market differential was erroneous for this reason.[74] However, the NCMPF draft which proposes revisions to an existing draft is dated June 5, 1935, and other inconsistencies abound in the draft. Not only is the testimony of these two witnesses rebutted by the documents alluded to as the basis for their testimony and which they understandably failed to produce to support the same, but the names of these two "drafters" of the 1935 Act never appear in any Congressional reports or records, a fact which would obviously preclude the admissibility of any testimony from them to contradict or supplant the Congressional intent that is clearly spelled out in the Act and Reports.

The witness Hall also failed to produce any documentary evidence to support his testimony that the cooperative associations applied a nearby differential prior to federal regulation, although he has been associated with the largest New England association for fifty years. Significantly, the economist for this association, James Lee, as well as other economists for nearby organizations who did not appear in *Cranston*, testified during the administrative hearings that there was no nearby differential as such prior to federal regulation (A. 371, 440, 580, 572, 541-42, 652, 666, 698) and that the higher prices received by nearby producers were attributable to the use of their milk for fluid purposes. (A. 400, 405, 536, 543, 557, 560, 570, 652, 662-68, 678, 681, 690, 703). Attorney Hall appeared in said administrative hearings, and his testimony in *Cranston* was necessary to replace that in the administrative record because the Act refers to "volume, market, and production differentials *customarily applied by the handlers*" prior to the Act.

The other witness, Donald Kane, actually confused the nearby differential with the authorized market differential

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[74] The witnesses did not explain why the later Senate Report No. 1011 contained the same definition or why it had never been disputed or corrected.

relating to direct-delivery and savings in handling costs, but this obvious error was not brought out by plaintiffs on cross-examination after the witness testified as follows on direct in *Cranston*:

> "Q. Now what types of provisions could you recall were generally included in these various licenses that you actually worked on relative to the distribution of the proceeds from milk? . . .
> A. . . . in practically every market by reason of economics there was a nearby differential, because the nearby farmer's production was more even; *he delivered usually to the dealer's plant* or the dealer came out to his farm and picked up his milk. *It didn't have to go to a cooling station or receiving station and he cooled and then re-transported* . . .
>
> Q. But these differentials *that you have been describing* to the court here were included in licenses that you helped to prepare, is that right?
> A. That's right.
>
> Q. And these included the differential between farmers in that particular marketing area that had to do with this relative nearness to the market *beyond the cost of transportation*?
> A. That's right."

As in *Cranston* upon which they so strongly rely, petitioners attempt to find an ambiguity where none exists and they presume to contradict a Congress that was foresighted enough to anticipate the very contentions made by them. Their claim that Congress did not know what it was doing or saying when it wrote the 1935 Act and Reports, even though Congress specifically stated to the contrary, reflects a quarrel with the Congress rather than with non-nearby producers. The contention that Congress made a mistake because of a hasty drafting of the Act and Reports is made in the wrong forum, for no court has the power to amend the Act or entertain such contention

that necessarily admits that there is no ambiguity. It is only where Congressional intent and statutory language are ambiguous that interpretation and construction are warranted. *Alaska S.S. Co. v. United States,* 290 U.S. 256. Interested attorneys may not resort to their own testimony as an "interpretative aid" to amend the Act and rewrite the Committee Reports that they contend are erroneous. Nor does such a power over that possessed by the Congress exist in the Secretary, and a contention of this nature also violates the rule in *Schechter* that the Congress rather than the Secretary is to define the statutory power delegated under the Act. The nearby differential is not enumerated in the Act and is entirely inconsistent therewith, and it could be an absurdity to contend that Congress intended such a dominant and inconsistent differential without specifically providing for the same in clear and unmistakeable language. As stated by this Court in respect to this very Act, it is doubtful if Congress would hang the main gear on the tailpipe, its opinion in *Brannan v. Stark,* 342 U.S. at 465-66 also stating that:

> "Without support in the words of the statute the challenged provisions must fall, for neither legislative history nor administrative construction offers any cogent reasons for a contrary result. . . . Nor have provisions bearing substantial similarity to those before us since been included in other milk orders so frequently as to amount to an administrative interpretation of import in construing the Act."

Of course, there may be members of the Congress who are uncertain of the meaning of some part of a statute, or there may be some whose opinions on the meaning of an Act sincerely conflict with the reports concerning the legislation, but these factors are not persuasive of the *Congressional* purpose and cannot be utilized to thwart

the same if democratic government is to exist. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110. Nor can one word or phrase of a statute predominate over the whole Act and its purpose and policy, a result which is manifest in the *Cranston* court's judicial legislation on the basis of the private testimony of non-members of the Congress.[75] Far from being authority for petitioners, the case of *Chicago v. Acme Freight*, 336 U.S. 465, actually supports the respondents. No person has questioned the accuracy of the Committee reports here involved for 32 years, and attorney Hall, associate counsel of petitioners' attorneys in *Blair* and this case, can hardly stand in the shoes of the Congressional member mentioned in *Acme Freight* whose contemporaneous statements included a section-by-section analysis that was accepted over language in a House report that would otherwise serve no purpose whatsoever. In fact, the situation here is just the reverse, for the entire Act would be nullified by an interpretation that is completely devoid of any record support in the Congress. Moreover, the statements of Representative Wolverton were open, accurate, and unchallenged, whereas those made in the *Cranston* case were just the opposite.[76] Respondents also submit that petitioners'

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75 Attorney Hall is unknown to members of the 1935 staff and House Committee who have been consulted by respondents.

76 The plaintiff, Cranston, who sold his cows shortly after the *Cranston* trial and retired, admitted that he had advised only one dairy farmer (other than the individual plaintiffs) of the suit. Two others listed as plaintiffs were unaware of such fact and had never authorized the use of their names as plaintiffs. The plaintiffs' attorney had never contacted these two plaintiffs concerning the suit but advised the court that their absence from the trial was due to illness, one of the so-called plaintiffs testifying at the collusion hearings that he did not even know Cranston's attorney.

(cont'd)

other case, *United States v. Amer. Trucking Assoc.*, 310 U.S. 534, is authority for the principle that where acceptance of the literal meaning of words in a statute leads to results which are absurd or futile or plainly at variance with the policy of the Act, as would be the case if the "market" differential authorized any type differential in the milk markets, the legislative purpose will be followed. Not only are the facts distinct where a new program was instituted by the Congress in 1933 and 1935, but there is no reason for going beyond the Committee Reports of the House and Senate in this instance. Moreover, the interpretation claimed by petitioners would, if accepted, amount to an unconstitutional discrimination against respondents, but the respondents' contention

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76 (cont'd) Attorney Hall, who admittedly fails to consult his association's members concerning matters that affect their very livelihood before stating their position in administrative hearings (A. 725-27) admitted during the *Cranston* collusion hearings that he had not told NEMPA members that he testified as the main witness in *Cranston* after promising members who objected to his undisclosed participation in this case that he and the NEMPA would take no further part in nearby differential litigation on the side of nearby producers:

> "Q. Now, you, I believe, testified that producers are aware of the fact that you have not participated further in the *Allen* case. * * *?
> A. I have stated publicly to producers' meetings held in various states in New England, among others, Vermont, Massachusetts, New Hampshire that, with the denial of the petition to intervene in the *Allen* case, there was no further participation by me in the *Allen* case proceedings and would not be.
>
> Q. Now, have you stated publicly to those same producers that you have testified in these proceedings?
> A. No, sir."

would not constitute any discrimination of any nature against nearby producers who may obtain any premium over the minimum uniform price from handlers if entitled thereto. (A. 692). Clearly, there is no ambiguity in respect to the market differential authorized by the Act and included in the zone differential of the Order. Further, the petitioners can no more attack the market differential under which they accept payments for their milk than the Secretary can disavow his own action in recognizing the correctness of the Congressional definition. "The market differential rationale is plainly not a tenable basis for the nearby differential." *Blair v. Freeman,* 370 F.2d 229.

The petitioners mention two cases, other than *Cranston,* in claimed support of the all-inclusive nature of the market differential but these cases have only an apparent application to their arguments. One is *Green Valley Creamery v. United States,* 108 F.2d 342 (1939), and the other is *Brannan v. Stark,* 185 F.2d 871, *affirmed,* 342 U.S. 451.

The *Green Valley* case authorized a differential between the price received by cooperative associations and producers who were not members thereof, the difference in price being authorized under the Boston order on the basis of the marketing services performed by the cooperative associations. This Court in the *Stark* case, also dealing with a cooperative differential under a later Boston Order, did note that *Green Valley* had approved the cooperative differential under Subsection 8c(5)(A) as a "market differential." This was possible because of the marketing services then performed by certain cooperatives, and the definition of the market differential as set forth in the Reports was not thereby violated. The market differential, as previously stated, normally represented the difference between the costs of receiving the milk at the city market or plant and at a country plant where the milk was weighed, tested, cooled, etc. and reshipped to the city

market. If the cooperative association performed such marketing services for its producers, it would be entitled to a part of the difference in costs incurred under the market differential definition. Moreover, the Act specifically authorizes payment to all producers "and associations of producers", and Subsection 8c(5)(E) authorizes appropriate deductions for the verification of weights, sampling and testing of milk, even when such marketing services are not performed by cooperative associations. All that need be noted here is that some cooperative associations perform certain marketing functions in handling their members' milk, services that were performed in some instances at country receiving plants or that must otherwise be performed upon receipt of the milk at the city plant. Consequently, it is entirely proper to refer to the added payment to the cooperative association as a market differential, for this differential is concerned with handling costs as previously explained. This in no way provides a basis for extending the market differential beyond its normal meaning in order to accommodate it as a nearby differential based upon the location of a producer's farm and the fluid use of his milk.

The *Stark* case thus does not support petitioners in any manner and, indeed, this Court there noted that with the *Schechter* and *Panama Refining Co.* cases "specifically in mind, Congress set forth with deliberate *particularity and completeness* the terms which the Secretary might include in marketing orders. H. R. Rep. No. 1241, 74th Cong., 1st Sess. 8; S. Rep. No. 1011, 74th Cong., 1st Sess. 8." In *Stark* there was some question as to the discriminatory effect of the regulation and the reduction resulting to non-members of the cooperatives, but in this case the discrimination is without even apparent justification in diverting a part of non-nearby producers' price and property to those who admittedly provide no value or service therefor. The analogy of the *Stark* case is thus particularly applicable here:

> "The payments to cooperatives are inconsistent with § 8c(5)(A), which provides that all handlers shall pay uniform prices for each class of milk, subject to certain adjustments of no concern here. The discriminatory effect of the payments becomes the more evident when they are considered in context with the reduction in the uniform allowance to all handlers on the price of Class II milk. That reduction is simultaneous with the establishment of the system of payments to be made to cooperatives only and to be funded by deductions from prices paid all producers. The result would have been substantially similar if the allowance to proprietary handlers had been reduced while the allowance to cooperatives had been permitted to remain at its previous higher level. Such a lack of uniformity in prices paid by handlers would clearly have contravened § 8c(5)(A)."

Although petitioners totally fail to establish that the nearby differential is authorized under the Act, they maintain that nearby producers are entitled to a part of the non-nearby producers' uniform price because of the "availability" and "inherent value" of nearby milk. The short answer to this is that the Act does not authorize a diversion of price on either basis. As the Court below recognized, the availability factor referred to the 1930's, and the Secretary admittedly related this factor to the fluid use of nearby milk, the 1936 Boston Order specifically stating "availability for Class I use." (A. 224). Even if such a finding could be divorced from the illegal criterion of payment based on use of nearby milk, it is clear that the uniform price could not be reduced by virtue of the alleged inherent value or availability of nearby milk. The Secretary specifically rejected the issuance of a nearby differential on such basis in his 1957 decision when he found that "the *inherent value* of nearby milk

to the market because of its *availability* and the high quality of such milk" are factors which, "to the extent that they are valid, are related to the extra value of such milk to the *handler* who buys it rather than to the producer generally and are, therefore, appropriate for consideration with direct-delivery differentials *payable by handlers rather than out of the pool.*" 22 Fed. Reg. 4213; *Blair v. Freeman,* 370 F.2d 229.

The increased frequency of voluntary sales of nearby farms for housing subdivisions or commercial development hardly denotes reliability or availability of supply. Petitioner's reference to the accessibility of nearby milk to small handlers is also lacking in merit, in that such dealers were able to procure any required supply from more distant areas at the time of passage of the Act. This Court has also noted that it was usually the small dealer who undercut the producers' milk price and failed to bear his proper share of the burden of surplus in the market. *Nebbia v. New York, supra.* It cannot be seriously contended that respondents must subsidize such "small dealers" as well as the larger nearby producers, particularly when they both refuse to bear their share of the burden of surplus of the market. Moreover, high-cost handlers, whether large or small, certainly do not promote competition or discourage monopolies. The only real competition is between large dealers, a handful having dominated the markets for the past 35 years,[77] and any contention that the nearby producers

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[77] Marketing Economics Div., USDA, *Nature of Competition In Fluid Milk Markets* (Agric. Econ. Rep. No. 67, 1965).

can enter the retail city market under present day conditions and thereby lower the blend price by removal of Class I sales from the pool is simply unrealistic because of the prohibitive costs involved and dealer concentration (A. 309-310).

Petitioners rely heavily on the *dictum* in *Green Valley v. United States*, 108 F.2d 342 (1st Cir. 1939) which offered some gratuitous comments concerning the "location differential" of the Greater Boston milk order of August 1, 1937. This case was thoroughly considered in both *Blair* and this action, and it should be noted that the a action was one by the United States against handlers for enforcement of the milk order provisions. *No producers were involved in that case,* and the Court itself belatedly acknowledged that the handler had no standing to question disbursements from the marketwide pool or producer settlement fund. Nevertheless, the Court did make the gratuitous comment that the nearby differential was authorized under the Act as a location and market differential and stated as follows:

> "*Whatever the explanation,* this group of producers in fact commanded somewhat more favorable prices for their *fluid* milk as against producers more remotely located. The differentials now objected to were inserted in the Order *so as not to disturb the status quo in this respect.*"

Initially, the plaintiffs make the point that the validity of the nearby differential was not before the Court, and the Secretary can hardly contend otherwise when the Court itself accepted the Secretary's argument to this effect. Furthermore, it is difficult to comprehend how the

Secretary has "relied" over the years upon such case as sustaining the validity of the nearby differential when that case actually accepted the Secretary's contention that the question involved herein was not before that court.

The Court stated that the differentials were "largely undefined" but this is obviously incorrect, for the entire Act and Congressional reports reflect the care and caution used in drafting the legislation because of the then recent cases of *Schechter Poultry Corp. v. United States,* 295 U.S. 495, and *Panama Refining Co. v. Ryan,* 293 U.S. 388.

The *Green Valley* court apparently failed to realize that *all* producers were receiving depressed prices prior to the Act and that "preservation of the status quo" would relegate nearby producers to surplus prices. It failed to realize that the "historical-higher price" argument was rejected in *Hood* when non-nearby producers sought to preserve their historically higher prices and status quo in relationship to other producers. It failed to realize that such contentions would nullify the uniformity of price required by the Act and that the provision concerning free entry of all producers into a marketing on equal terms after two months regular delivery was in opposition to such concepts. It failed to realize that the Act brought higher prices to all producers and that no preference was engrafted thereon in favor of any group of producers. It failed to consider the prohibitions of the Act concerning payment based on use of milk and many other relevant arguments.

The reason for such failure is clear when one considers that the *dictum* in *Green Valley* concerning the nearby differential rested on an acknowledged presumption concerning delivery of nearby milk to city markets which excluded the non-nearby producers without explanation or

comment. Plainly, the court was unaware that the authorized market differential for direct-delivery of milk to the city market was already in the Order. This is why the Court regarded the nearby differential as the market differential, for it would hardly approve two differentials for the same service. The fact that non-nearby producers were not embraced within the Court's presumption, although included in the market differential of the Boston Order, also demonstrates that the *Green Valley* court was unaware of the existence of the authorized market differential in the Order. Its realization that direct-delivery was deserving of reward was the dominant consideration in the Court's thinking and explains why the aforementioned matters were not considered by the Court.

However, even if this analysis of the Court's *dictum* is disputed, the fact still remains that it was erroneous for the previously stated reasons and because the presumption on which it acted was incorrect. The Court presumed that all nearby producers delivered directly to market but this was never established in the record (A. 237) and was actually contrary to fact (A. 631, 635, 698). Indeed, the Secretary had to amend the nearby differential provision as recently as 1946 because "nearby" producers were delivering to country plants and receiving a price in some instances that exceeded the Class I price at the particular plant zone at which their milk was delivered. The nearby producers in the 23-cents zone were being paid the blended price plus 23 cents or such fraction thereof as equaled the Class I price, rather than the Class I price effective at the particular plant where their milk was received (A. 638-39). Consequently, this part of the differential provision was amended on June 1, 1946, 11 Fed. Reg. 3607 at 3612:

"(15) *Price to producers within the 80-mile zone.* The order provides that the Class I price at city

> plants shall be the maximum required price to producers whose farms are located within 80 miles of Boston. This maximum prevents producers delivering to city plants from receiving credit from the pool at more than the Class I price for their milk after the addition of the location differential but it has not prevented producers in the 41-80-mile zone *delivering to country plants* from receiving credit from the pool in certain months at more than the Class I price in effect at the plants to which they deliver . . . "

In all fairness to *Green Valley,* however, it is noted that it was decided almost 30 years ago, and the court's superficial examination of the matter was attributable to the very fact that the validity of the Boston nearby differential was not before the court as an issue in the case. The Secretary and the nearby producers, however, would cite such dictum as binding precedent, even though it would preclude a small dairy farmer from having his day in court, would deprive him of his right to make appropriate claims and defenses concerning the taking of his property and violation of his constitutional rights, and would also prevent him from questioning the present applicability of conditions that existed 30 years ago. The respondents submit that the inaccurate citation of arguments and briefs of parties whose interests are adverse to those of respondents or who are opposing parties herein can scarcely bind the respondents and particularly when non-nearby producers were either not parties or adequately represented in such cases as *Green Valley, Rock Royal* and *Cranston.*

In spite of all the foregoing, the petitioners and the *Cranston* court attempt to find support for the legality of the nearby differential in the *Green Valley* language that "similar differentials" in favor of nearby producers

had existed under the base-rating provisions of the licenses and the 1936 Boston Order prior to the inclusion of the nearby differential in the Boston Order on August 1, 1937. Initially it must be acknowledged that "base-rating" or "base-excess" plans are authorized under 8c(5)(B)(ii)(d) of the Act, and this very fact indicates that it is separate and distinct from the market differential authorized under provision (a) of that subsection. Neither constitutes a proper ground for issuance of the nearby differential and the repetitive usage of the term "similar differentials" to equate such early base-rating with the nearby differential not only confuses two different things but actually constitutes an admission of the illegality of the nearby differential. The illegality of the early base-rating whereby nearby producers were paid a Class I or fluid milk price for their base milk and the non-nearby producers a composite or blend price that carried the surplus of the market is pointed up by the 1965 amendments to the Act. The Act clearly requires that all producers be paid a Class I price for their base milk, and their bases are computed in relation to their marketings over a representative period of time. Producers may produce more than their "base" under a Class I base-rating or base-excess plan, but they receive the Class II or surplus price for such excess over their base. The purpose of the plan is to bring production within the needs of the market and to thereby eliminate unnecessary surplus. It is in no way comparable to the nearby differential, for it applies to all individual producers, not to groups or classes of producers. Secondly, it must be separately approved in a referendum among individual producers on this question alone, not in connection with bloc voting by an association for its membership on a milk order as a whole. Thirdly, it is a method for seasonal adjustment of production to control unnecessary surplus, not for the apportionment of the fluid market to one group of producers in a particular

area of the milkshed and the necessary surplus to the remainder in another area without consideration of the individual variations among each group and area. Fourth, the Secretary specifically found in his 1964 decision, 29 Fed. Reg. at 11225, that a base-rating or base-excess plan was inappropriate for the New England markets. (A. 359-60). Moreover, the New England orders already include a seasonal incentive plan to reward evenness of production. 32 Fed. Reg. 5288.[78]

Additionally, the reliance of the petitioners and the *Cranston* decision on the early base-rating provisions in the Greater Boston licenses is clearly misplaced, both in respect to justification for awarding a larger share of the fluid milk market to nearby producers through the nearby differential and in respect to Congressional ratification of such allegedly "similar differentials" by the 1937 re-enactment of the Act. In allotting preferential bases under License 15 in 1933, the License specified three exceptions to the general method of awarding bases. One related to producers whose milk on September 1, 1933,

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[78] In respect to the chart concerning seasonality on page 71 of the Zuber brief, we note that the same report, *Producer Delivery Patterns in The New England Markets,* specifically states in its Summary that, "Among all sizes of farms in both the distant and nearby areas there was a great variation in the shape of seasonal patterns. In other words, even though a group of farms in an area may have had an average seasonal pattern of a particular shape, the average was actually made up of patterns of many different shapes." Although the matter is irrelevant because of the special provision in the Order for rewarding evenness of production, it is noted that this factor varies from farm to farm and that non-nearby farms have a more uniform delivery pattern than nearby producers if other criteria is used for determining this factor. See A. 307, 314-16, 326, Exhibit 20 at 328, 428).

was being trucked *directly* from farms to plants located in the marketing area.[79] The second related to country producers delivering milk under a base-rating plan in effect on said date, and the third exception was in favor of the Guernsey producers who received bases equal to the average daily sales of Golden Guernsey milk in the market as Grade A fluid milk or under the Golden Guernsey trade name during the general base period.

However, the "similar differentials," prior "preferential bases", and "ratification" arguments did not enable Golden Guernsey producers to obtain an added differential for their milk under the New York federal order when they argued that the butterfat differential did not adequately compensate them for the greater marketability of their milk for fluid use or for their additional production costs. *N.Y. State Guernsey Breeders Co-op v. Wickard,* (CAA 2, 1944) 141 F.2d 805, *cert. denied,* 323 U.S. 725 (1944). Although the Guernsey producers were able to show that they had been able "to secure a higher-than-average Class I (fluid milk) utilization for the milk of their members" prior to regulation, the Second Circuit still held that they were not entitled to a differential over the uniform minimum price:

> "This finally is the ultimate issue in the case – one, of course, of outstanding importance in milk regulation. It seems to us that the Secretary has correctly construed the law, and that production costs or marketability are not in themselves factors to influence minimum milk

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[79] This is the market or direct delivery differential specifically authorized by the 1935 amendments to the Act, and it was the "practice of business" referred to in the Congressional Reports and Record.

> prices. For such prices it hardly seems pertinent that special allowances should be made for milk more expensively produced, or more extensively and successfully advertised, but not better in grade or quality. In a purely competitive industry factors of this kind may well affect the market price, *but when regulation by way of minimum price is substituted by reason of the very disorder of the market and its effect in impairing farmer purchasing power* (Sec. 1, 7 U.S.C.A. 601), *it is not surprising to discover no allowance for them in the governing authority.*"

Moreover, the Second Circuit noted that the high fluid utilization rate and resultant higher prices might have been due to extensive advertising, superior selling practices, *or proximity to fluid markets,* the specific inclusion of the latter factor indicating that the Second Circuit did not view such proximity to fluid milk markets, or any previous higher-than-average Class I or fluid utilization as a result of such location of certain producers, as a valid reason for special treatment of such "nearby" producers. Significantly, Circuit Judge Frank was a member of the panel that rendered this unanimous decision, and he obviously did not regard the Secretary as having unfettered discretion under the Act, although he naturally recognized that the Secretary had considerable discretion under the Act in respect to the authority granted him by the Congress.[80]

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80 Details of administration of the orders and Congressional program are left to the Secretary, but the extent of his statutory power is prescribed by the Act and determined by the judiciary under Art. III of the Constitution. *Stark v. Wickard,* 321 U.S. 288, 310.

The respondents respectfully submit that petitioners acknowledge the illegality of the nearby farm location differential when they equate the same with the 1936 Greater Boston milk order provision which provided for the payment of the Class I or fluid milk price of $3.30 per hundredweight for the base milk of "nearby" producers and the payment of a composite or blend price to the non-nearby producers who shouldered the surplus of the market in such manner. Article IV of said Order, entitled "Minimum Prices", provided that the Class I minimum price was $3.30 per cwt. for milk delivered within 40 miles of Boston, and the respondents maintain that the Act clearly forbids the payment of the Class I or fluid milk price to a preferred group of producers for any reason, and particularly on the ground that such producers had received higher prices prior to the Act because of the fluid use of their milk. Although the petitioners attempt to maintain that nearby producers were paid a "nearby differential" of 44¢ under the 1936 Boston Order by reason of the fact that their milk price exceeded that of other producers by such amount, the simple fact remains that nearby producers were paid the Class I or fluid milk price of $3.30 per cwt. and not a nearby differential as such. The petitioners neglect to explain that the $3.30 was the Class I price, and the reason for such omission is an evident awareness that such payment for the use of milk is a fundamental violation of the Act.

In respect to basing the nearby differentials on allegedly higher production costs, the Second Circuit not only agreed with the Secretary that the Golden Guernsey producers could not be awarded a differential on such basis but also stated that:

> "[5] The declaration of the policy of Congress in §8c(18), 7 U.S.C.A. § 608c(18), that the *level of prices* should be 'such level as will reflect the price of feeds, the available supply of feeds, and

> other economic conditions which affect market supply and demand' obviously refers to the general price level for producers, not to differentials among producers."

In this connection, it should be noted that petitioners not only *falsely* state that the elimination of the N.Y.-N.J. nearby differential and the suspension of the Mass.-R.I. differential necessitated "emergency price expedients . . . 33 Fed. Reg. 9502, 12849 (1968)", but that these false *in terrorem* citations also illustrate that such costs of production, etc., are considered on a *regional* basis and that the nearby differential may not be grounded on allegedly higher production costs. One of the Secretary's decisions cited by petitioners refers to drought conditions in Vermont that necessitated an increase in the Class I price. However, the nearby producers also received such *regional* increase and actively supported the same for that reason. The other cited decision refers to an increase in the Class I price for all of the Northeast markets which was necessitated in order to bring such prices in alignment with those in the Midwest markets where the Class I price had been raised by the Secretary. Neither decision has the slightest thing to do with the termination or suspension of the nearby differentials, and the citations are simply illustrative of the innumerable misstatements that characterize petitioners' briefs and prior statements to the lower courts.

Interestingly, we noted that petitioners abandoned the "cost of production" contention before the Court of Appeals, and we also note that the Secretary rejected that factor as a justification for the differential in his 1957 decision:

> "Cost of production is a criterion for establishing prices under an order only to the extent that it affects the supply of milk for the market.

> Orders do not guarantee a price equal to or exceeding the cost of production, and therefore, producers generally should not be required to pay a minority an increased return because of high production costs. Accordingly, it is concluded that factor (1) above does not provide a legitimate basis for nearby location differentials." (22 Fed. Reg. 4213).

Further, the deductions made by the Order for transportation and handling charges enter into the non-nearby producers' cost of production and many other factors are presently involved that were non-existent in the period prior to the Act. In any event, prices are computed on a *regional* basis. The foregoing also illustrates the inability of the petitioners Zuber, et al., to rewrite the production differential to embrace production costs. Although irrelevant to the present case, the production differential refers to the fact that milk produced for manufacturing use was not subject to the same high sanitary standards as all milk in the milkshed is today. Many producers were reluctant to make the investment necessary for the production of fluid milk, and the Congress included this provision in the public interest in order to assure an adequate supply of milk. There were severe shortages of milk during periods of military warfare,[81] and the Act provided that new producers were entitled to only the lowest use classification price for the first two months of delivery. The production differential could be used as a temporary measure to encourage fringe producers to change over to meet the nation's milk needs, and many producers had been reluctant to make such investment because others who had done so had been dropped by handlers shortly after the emergency passed and their milk was no longer

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81 See USDA, *Information for Increasing Milk Production for War Needs* (1943).

needed. Additionally, the Congress was aware that those producers who were already within a milkshed and receiving the uniform price would need an inducement to cause them to make the investment for production of fluid milk, and the production differential was a temporary payment to assure the change-over.

The volume differential has already been noted as having been employed by the Dairymen's League, largest of the cooperative associations with many thousands of members, and USDA experts have recognized the propriety of such a differential. Both this differential and the production differential would be received only by so-called non-nearby producers and neither constitutes even a remote basis for the nearby differential. Individual-handler pooling could not be a substitute for the nearby differential for the simple reason that the uniform price under such type of pooling is also subject to all authorized adjustments or differentials. Moreover, the Secretary found such type of pooling to be injurious to producers and consumers in New England. (A. 358-59).

The Act states that the uniform price is subject *only* to the enumerated adjustments, and it is abundantly clear that the nearby differential is not among them and that it is violative of the statute. The petitioners themselves acknowledge this obvious fact when they vainly attempt to bring it within some hopefully permissible definition and authorization by a scatter-shot approach which finally admits the failure of the statutory safari, their "conglomerate" differential rationale being without foundation or existence in either the Act or any decision of the Secretary. Succinctly put, the petitioners attempt to amend the Act by repealing the specifically authorized differential adjustments and replacing them with a "conglomerate" differential embodying those supposed aspects of each adjustment that might provide some basis, however implausible, for the nearby differential. Such circular and

inconsistent reasoning should hardly be attributed to a Congress that recognized not only the great importance and need of the legislation, but also the danger attendant to this very type of "conglomerate" approach that had been condemned in *Schechter* and in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

3. The Act Provides for Certain Authorized Adjustments Customarily Applied By Handlers, Not Producers

The Act provides that the uniform price is subject to adjustment for the volume, market, and production differentials "customarily applied by handlers", and there is no provision in the Act which would authorize or justify the transfer of responsibility for such payments from handlers to producers, let alone to a group of producers whose farms are located in the non-nearby area of the milkshed. Payment from out of the marketwide pool is clearly not authorized because marketwide pooling did not even exist in the Boston milkshed or in any of the secondary markets prior to the Act or federal regulation, and it would have been an impossibility for handlers to "customarily" apply the differential from such nonexistent source. It is also clear that handlers could not "customarily" apply the nearby differential under individual-handler pooling because the nearby producers constituted only about 5 percent of the producers serving the Boston market prior to the Act. (A. 633).

Moreover the 1963 administrative hearing record for the present Order reflects that no nearby differential as such was ever applied by handlers prior to the Act, and the following testimony of economists for nearby associations discloses that the price statistics cited by the petitioners refer only to the prices paid for fluid milk and not to any nearby differential:

(a) **From testimony of James Lee, economist for N.E.M.P.A. and former official of Administrator's Office For Greater Boston milk order.**

CROSS-EXAMINATION

By Mr. Tipton:

"Q. I am sure you are very familiar with Exhibit 24, which contains an article on farm location differentials. In this article you portray or make a statement as to what testimony was entered at a hearing prior to the issuance of the order in 1937, which happens to correspond with the differential rate that was put into effect in 1937.

That differential, or the testimony that was given, closely related to the 46 cent differential, did it not? A. Yes.

Q. Now, can you tell me: Who paid that differential? I do not mean by name, but as a group. A. *Who paid the differential? There was no differential.*

Q. Did the handlers pay the differential? A. The handlers paid the producers who delivered the milk at the city plants a level of prices which was in relation to the up-country prices as the evidence in the hearing record at that time, which is quoted in the article, explains." (A. 371-77).

* * *

"Such payments have been justified over the years as a recognition of the historical pattern of prices which existed prior to regulation, or as compensating nearby producers for sharing a part of the fluid milk market which they formerly enjoyed, with producers more distant from the market. * * *" (R. 3393, Mass.-R.I. hearings); see also, A. 400, 405, 536, 543, 560, 570, 645, 652, 662-68, 678, 681, 690, 703.

The said economist, James Lee, also admitted during the 1963 administrative hearings that no premium was presently being paid by handlers to nearby producers (A. 375-76):

"Q. Do you know of any handlers in the nearby area that are paying in addition to the blend price a premium?

A. I don't of my own knowledge known any handlers who are now, but if and said and did know that these are such, your next question would be, 'Who are they,' and just have the feeling that there are some –

EXAMINER HOLSTEIN: Let's not anticipate what Mr. Tipton's next question will be. This question is: Do you know of any? If you can answer that, do so; then when he asks his next question we will decide on that.

THE WITNESS: I don't know the names of handlers paying premiums."

(b) From brief of Mass. Coop. Milk Producers Federation:

> "The higher rate per hundredweight was not arrived at by milk dealers then through the process of computing a distant price and adding thereto a premium or differential in order to arrive at a final figure. * * * There was no evidence then, nor has there been any new concrete evidence developed, that what became a 'farm location differential' in the New England orders was ever paid to nearby milk producers by the handlers themselves, except as an inseparable component of a higher going price for milk. . ." (A. 652)

(c) **From testimony of Christopher B. Sykes, official of nearby organization:**

CROSS-EXAMINATION

By Mr. Tipton:

"Q. I am asking though what contributed to this higher price being paid? A. I have not made any statement that I know of about that . . .

Q. Well, in the next sentence you say, '*This higher rate per hundredweight was not arrived at by milk dealers then through the process of computing a distant price and adding thereto a premium or differential in order to arrive at a final figure.*' Now I think that statement probably stands correct. However, did not these handlers arrive at the price at which they were willing to pay for the nearby milk by comparing that to a price at some other source? A. I think undoubtedly being big men they assessed the economic situation, yes, if that is what you mean.

Q. And they paid a higher price for milk from nearby sources as compared to milk from more distant sources for some reason, is that right? A. They must have had some reason, yes.

Q. Well, can you tell me some of the reasons you think it might have contributed to that higher payment? . . . A. No, I have no knowledge of the individual reasons that each individual handler might have used in arriving at this price. I make no assertion that I do know. . .

Q. Who paid the differential prior to Federal regulation, producers or – A. If you read my direct testimony or heard me give it, Mr. Tipton, you know I have adopted the position that *it never was in fact paid by handlers to producers by such at all.*" (A. 579-80, 593)

(d) **From testimony of Dr. David Clark, economist for nearby organizations:**

By Mr. Tipton:

"Q. My last question was: What do you imply by the last portion of the sentence that I was referring to, on page 20? A. And the question is the one that reads: "These differentials *developed* in response to the need for some compensation to induce local producers to accept the provisions and consequences of marketwide pooling."

Well, what I had in mind here is that apparently historically producers located relatively close to the market had generally enjoyed a higher percentage of Class I utilization, either because of favorable relationships with local distributors or alternatively because of the fact that they were possibly in a better position to go into a producer-dealer type of operation, and thereby increase their Class I utilization.

Now, this particular advantage, under marketwide pooling – they were more or less asked to relinquish, *and as a compensation for relinquishing this advantage, the differentials were encompassed in the order.* This is my understanding of the material quoted at the hearing." (A. 542-43, 551).

(e) **From testimony of William J. Newman, Official of a nearby R.I. organization:**

"Q. Just one question, Mr. Newman. In the time in the southeast area prior to the promulgation of the marketwide pool order, were these higher prices that were being received by local producers the result of any computation of distant prices *and then the adding of some amount to it* or was this just the product of Class I utilization in a handler's plant and reflected in the prices received by the producer shipping to him? A. Prior to the southeast order nearby farmers got returns that reflected

the use value of that milk and we feel again that the nearby differential despite the arguments that were given for discontinuance does reflect the added use value of nearby milk over distant milk and it should be continued.

Q. Let me ask one further question then. These handlers that were paying these prices as a result of higher utilization, they did not arrive at the final pay price to producers, did they, by any computation of any other price then the adding to it of a set figure like a differential? A. *No, that is right.* (A. 486).

(f) From the Federal Milk Order Study Report (Nourse Committee), Dec., 1962, introduced into evidence at the Mass.-R.I. hearing:

"However, the major *purpose* of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a marketwide pool. This principle seemingly was *founded* on the belief that in the absence of regulation, a higher percentage of nearby milk would be sold for fluid use." (A. 450-52).

(g) From the testimony of Irving E. Sutin, General Ice Cream Co., during 1949 administrative hearings on Springfield, Mass., milk order:

"It does seem that the 46-cents and 23-cents farm differential of the NEMPA would be illegal since it is contrary to the AAA of 1937. The Act provides for differentials 'customarily applied by handlers subject to such order'. *No farm differentials had ever been paid in the Springfield market.*" (A. 695-98)

The above testimony was replaced in *Cranston* with that of attorney Hall, who testified that the differential was customarily applied prior to the Act.

It is crystal clear that petitioners would not have to cite such artificial, inaccurate and illegal price statistics if any nearby differential actually existed prior to federal regulation. No price study would have been necessary to determine an appropriate differential if it had been customarily applied by handlers prior to regulation. The price statistics refer only to the prices paid for milk for fluid use and not to any nearby differential as such, and any difference in the price of nearby producers, other than the well-known and specific amounts for transportation, handling, rental of cans, tax, etc., was necessarily attributable to the use of the milk and not the location of the farm. Such price statistics are clearly an illegal criterion for the issuance of the nearby differential since the effect thereof is simply to continue payment based on the use of milk. The only difference under the nearby differential is that smaller producers from less populous and influential areas are forced to pay such nearby differential because handlers would not do so and would have the financial resources to prevent such a basic illegality.

The respondents respectfully submit that the nearby differential is unauthorized under the Act as a volume, market, or production differential because it was never customarily applied by handlers, and they also maintain that there is no authorization in the Act for requiring producers, rather than handlers, to make the nearby diffederential payments in any event. Consequently, the nearby differential violates subsection 8c(5)(B)(ii)(a) of the Act.

4. The Nearby Differential Violates Section 8c(5)(D) of the Act.

The Act's command of a uniform price to each dairy farmer irrespective of the use made of his milk is subject to but one exception, in that subsection 8c(5)(D) of the Act requires that a new producer be paid during the first two months of regular delivery "at the price for the lowest use classification specified in such order." After the expiration of this time limitation he must be paid the uniform price, and this provision is thus also concerned with uniformity among producers. It strikes a balance by the Congress concerning its intention that all producers shall have free access to every market, but that the regular suppliers of the regional market shall likewise be protected from the sporadic marketings of those who would otherwise choose to market their milk only at opportune times in order to avoid sharing the surplus of the market and any responsibility for furnishing an adequate milk supply on a regular basis.

Significantly, the payment of the lowest price to new producers is also subject to all of the enumerated differentials or adjustments, including those for butterfat content, direct-delivery and transportation. However, if the nearby differential is an authorized differential, it would result in the new producer being paid a nearby differential by non-nearby regular producers because of the fluid use of his milk at historically-higher prices at the very time that he is receiving a surplus milk price because of his failure to previously supply the market. Such a double inconsistency can hardly be attributed to the Congress rather than to the petitioners, and it is manifest that these contentions are irrational in this regard. The Congressional command is simple, clear and unambiguous. It is grounded in reason. It reflects an awareness of the problem and a balanced solution for the same. The Secretary has no power to repeal or amend the work of the Congress, and the nearby differential is a flagrant violation of subsection 8c(5)(D) of the Act.

5. The Nearby Differential is a Trade Barrier Which Burdens Interstate Commerce and Interferes with the Free Flow of Milk in Violation of Subsection 8c(5)(G) of the Act

The preferential price treatment accorded by paternalistic States to their own citizens has consistently been held to be violative of the Constitution. Indeed, this was the foremost factor that led to the drafting of that document, the first convention of the States of the Confederacy being held at Annapolis, Maryland, in 1786 for the primary purpose of dealing with the numerous self-defeating duties and taxes levied by the States upon the products and inhabitants of other States and which inured eventually to their total disadvantage. The respondents maintain that the Secretary was not delegated any power to impose a discriminatory duty or tax upon their production for the benefit of other illegally preferred producers, and that Sec. 8c(5)(G) was specifically inserted into the Act to prevent the Secretary from arbitrarily preferring one group of producers or production area over another. The Supreme Court stated as follows in *Polar Co. v. Andrews,* 375 U.S. 361 (1964):

> "The power which we deny to Florida is reserved to Congress under the Commerce clause, * * * . This provision, as the Court explained in *Lehigh Valley Farmers Co-op, Inc. v. United States,* 370 U.S. 76, was intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States. We seriously doubt that Congress, *in denying the power to the Secretary,* thereby granted it to the States." (emphasis added).

The Secretary may fix prices, but he may not fix them illegally or in violation of either the Act or the

Constitution. Nor may a State or any group validly propose the exercise of such non-existent power by the Secretary, and they most certainly may not claim that such authority resides in themselves. *Baldwin v. Seelig,* 294 U.S. 511 (1935); *Dean Milk Co. v. Madison,* 340 U.S. 349; *Hood & Sons v. Dumond,* 336 U.S. 525 (1948).

The Secretary himself noted in promulgating the nearby differentials that various programs of State milk control boards were designed to assure a market for nearby or local producers, and that this was one of the reasons for the "higher prices" cited by nearby producers:

> "Registered Rhode Island producers have enjoyed a preferential market over an extended period of years. The allocation program and the procedure employed by the responsible officials of the State in issuing permits for importation of non-registered milk have tended to maintain such preferential market to the detriment of other dairy farmers whose production is an essential part of the market supply. * * * . (A. 343). And see A. 331, 336, 347 for other orders and pp. 64-67 of this brief, *supra.*

The Secretary found that federal regulation with the uniform prices provided by a marketwide pool were necessary "in order to give Massachusetts producers who are now supplying the market an opportunity to retain the market *on an equal basis* with out-of-state producers." Nevertheless, he succumbed to the demands for preferential treatment by those who needed the stabilizing influence of a marketwide equalization pool to receive any reasonable price for their milk. This is not a situation where the health of the inhabitants of a State is affected by unpure milk or where local producers are denied an opportunity to compete on an equal basis. It is simply a case where local producers largely preempt the higher priced fluid milk market by collecting a penalty or tax

on out-of-state producers, the inclusion of 58 out of 4,300 Vermont dairy farmers in the "nearby" area plainly not concealing or legitimatizing the intent to illegally prefer producers located in Massachusetts, Connecticut, and Rhode Island – the latter State contributing but about 1 percent of the market's milk supply and Connecticut only 4 percent thereof (A. 74, 55).

In the *Lehigh Valley* case, *supra,* the Supreme Court declared illegal the "compensatory payments" provision of a milk order which required a handler to make such payments into the Producers Settlement Fund when he brought "outside" milk into the region for sale as Class I or fluid use. The payments in *Lehigh* were made by *handlers* for the *laudable* purpose of protecting *all* producers whose milk was regulated under the regional order, and the payments were required only in those months in which surplus milk exceeded 15 percent of the total pool milk. The nearby differential payments, however, benefit only a minority of producers and constitute an injury to the majority of regular suppliers of the market who must bear the burden of surplus through such device. The non-nearby milk is being used to subsidize nearby milk, and the nearby producer is insulated from competition for the fluid milk market by virtue of the nearby differential payments. They constitute a burden on interstate commerce, interfere with the free flow of commerce between States, and amount to an illegal duty or tax on every hundredweight of milk produced and sold by Northern New England dairymen, the economic market barrier erected thereby being equal in degree to such tax or subsidy.

The *Lehigh Valley* case reviewed much of the legislative history relating to this provision, and the Court there recognized the care and caution exercised by the Congress in order to assure that the 1935 Act would withstand

judicial review. The original House Amendment of June 18, 1935, provided that, "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or product thereof produced in any production area in the United States."

When attempts were made to amend the amendment to substitute the words "limit or tend to limit" (instead of "prohibit"), the proposed change was defeated. 79 C.R. 9987. Those in charge of the legislation were fearful that such language could be construed to invalidate the entire Act and program, in that provisions therein for price-fixing, etc., were obvious limitations on the marketing of milk and the suggested change of language might be interpreted as embracing those implied but necessary limitations on marketing of milk. However, the language was changed to read as follows at the insistance of members of Congress from dairy states:

> "(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The key language here, which the *Cranston* court and petitioners overlook, is not "limit", but the words "in any manner." This latter phrase clearly spells out the Congressional intent that the Secretary may not *in any manner* limit the marketing of milk products from any production area, and it also indicates that a milk order may limit the marketing of milk only to the extent provided for in the Act. Thus the Congress solved the dilemma posed by the suggested amendment which would have merely restated the Congressional intent to place

no barriers in the flow of milk and which would also have placed the entire Act and program in jeopardy by a judicial misinterpretation of such amendatory language. Any doubt as to the Congressional intent is resolved by the following language from the Congressional Record:

> "MR. SNELL: . . . . I do not understand exactly what this means. "No marketing agreement or order applicable to milk and its products', and so forth. MR. JONES: That simply applies to fluid milk. You cannot make any limitation *at all* on the amount of butter or cheese or milk products that are shipped from one production area to another, *and the limitation that may be applied on milk is only such limitation as puts each area on an equality with the other areas after a certain period of about 2½ months.*" (79 C.R. 13022).[82]

This clear intent was reiterated by the Chairman of the House Agriculture Committee on other occasions, including the following:

> "MR. BOILEAU: . . . Mr. Chairman, I should like to ask the distinguished chairman of the Committee if in his opinion there is anything in this bill that gives to the Secretary of Agriculture or to anyone else any power to restrict the free flow of milk or any other commodity between the various States?
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> MR. JONES: No; there is nothing in it that will do that. The only tendency is to make all sections comply with the same rules." 79 C.R. 9572.

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[82] Subsection 8c(5)(D) of the Act relating to new producers.

Additionally, the record herein and the Secretary's 1936 Greater Boston order reflects that 90.8 percent of the milk sold in 1934 in the Greater Boston marketing area originated in States other than Massachusetts, almost 60 percent of the same coming from the State of Vermont and only 9.2 percent from Massachusetts producers. (A. 223, 674). After institution of regulations favorable to Massachusetts producers, however, the 1937 Boston hearing disclosed that their supply increased to 13.4 percent and that of Vermont producers declined to 52 percent. (A. 678, 697-80). In 1965, Massachusetts producers supplied 17.8 percent of the milk for the Massachusetts-Rhode Island marketing area, the Vermont supply being 49.4 percent. (A. 74). In addition to causing a substantial and progressive decline in the percentage of milk supplied by non-nearby producers, the nearby differential has caused thousands of such dairy farmers to abandon their vocation as the differential has continued to increase in amount along with the number of nearby producers. Intitally, at least 15,000 dairy farmers contributed to the nearby differential payments at a cost of 3 cents per cwt. of milk. (A. 451, 597). Now, however, the cost is at least 13 cents and the 6,500 non-nearby producers pay at least $3 million to nearby producers. (A. 55, 83, 240, 438, 609). See also, 307-310, 314, 432, 439, 451-52, 464, 518, 560, 669. As to the effect of the nearby differentials on distant dairymen, see illustrative protests filed by dairy farmers at A. 172, 178, 182, 184, 185, 166. See A. 176 for objections of Vermont Grange and A. 173 for that of Vermont Federation of Sportmen's Clubs, Inc., an affiliate of the National Wildlife Federation concerned with conservation of Vermont resources and dairy farms.

Moreover, the contention that respondents do not have standing to contest such economic trade barriers which they are forced to subsidize by a diversion of their uniform price is totally without merit,[83] and the cases cited by petitioners specifically distinguish the situation there

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[83] Respondents also rely on the Administrative Procedure Act.

present from that here and in *Stark v. Wickard*, 321 U.S. 2 which held that producers had the right to challenge such versions even if they could market their milk elsewhere:[84]

> "It is apparent that serious inequities as among producers might arise if the prices each received depended upon the use the handler happened to make of his milk; accordingly, Sec. 8c(5)(B) authorizes provision to be made for the payment of a uniform price to producers for the milk delivered irrespective of the use to which the milk is put by the individual handler. * * * The statute and Order create a right in the producer to avail himself of the protection of a minimum price afforded by Governmental action. Such a right created by statute is mandatory in character and obviously capable of judicial enforcement. For example, the Order could not bar any qualified producers in the milkshed from selling to area handlers. * * * It cannot be fairly said that because producers may choose not to sell in the area, those who do choose to sell there necessarily must sell, without a right of challenge, in accordance with lawful requirements of administration. Upon purchase of his milk by a handler, the statute endows the producers with other rights, *e.g.*, the right to be paid a minimum price."

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84 On January 1, 1964, prior to consolidation of the orders on Oct. 1, 1964, there were 692 nearby and 7,317 non-nearby producers under the Boston Order. Only 67.9% of the nearby milk was assigned to Class I use, the "distant" percentages varying from 79.1% in zones 9-15, 84.1% in zones 16-17, 70.7% in zone 18, and 90.5% in zones 19-20 or 200 miles from Boston. In January, 1966, the non-nearby producers numbered 7,696 but their number decreased to 6,706 on January 1, 1966, a loss of almost one thousand distant producers in the first year following consolidation of the orders. Nearby producers numbered 2,620 in January, 1965. *Milk Market Statistics*, Market Administrator's Office, Mass.-R.I. Order.

The nearby differential is clearly a barrier (A. 314) to the free flow of milk which unduly burdens interstate commerce, and a Report[85] of the USDA itself has cited the 40-mile zone surrounding Massachusetts cities as being one of the restrictive measures to which the federal government was strongly opposed. The Report further stated as follows:

> "A number of bills have been urged in Congress by which the Agricultural Adjustment Administration would be empowered to adopt policies that would place restrictions on the free flow of dairy products in interstate trade. None of these bills has been adopted. None had the support of the Agricultural Adjustment Administration. In opposing an act of this nature – a shipment permit proposed in 1934 (H.R. 8988) – the Adminis-tion took the position that:
>
> . . . Use of governmental powers to discriminate as between different groups of farmers has seemed to this Administration undemocratic and unjustifiable. The erection of 'tariff walls' around milksheds, creation of monopoly for farmers within, the exclusion by law of those outside, have the same unfortunate effects inside this country as erection of international trade barriers has upon world commerce. They lead to retaliatory action, which is injurious to the farmers and the public because it interrupts the economic flow of commerce."

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85 *Barriers To Internal Trade In Farm Products*, a Special Report to the Secretary of Agriculture by the Bureau of Agricultural Economics, USDA, March 1939). See also the excerpts from the Report of the Federal milk order study committee (1962) set forth in the Appendix to respondents' brief in opposition to brief *amicus curiae* of the State of Connecticut filed in No. 861 in connection with petitions for certiorari, pp. 25e-29e, as well as the testimony of

(cont'd)

6. The Differential has not been Ratified or Approved by Congress.

The Congress could not "approve" by silent acquiescence the nearby differential or the concept embodied therein without at the same time "repealing" Section 672 and the entire statute by such inaction, for the differential destroys the very purpose and policy of the Act.

The petitioners also failed to note that the first nearby differential was not promulgated until August 1, 1937 in the Greater Boston milk order, whereas the 1937 re-enactment of the marketing provisions of the Adjustment Act occurred on June 3, 1937. The main concern of the government at that time revolved around the fact that the production control provisions had been declared unconstitutional and that the processing taxes collected by the government might have to be refunded under certain lower court decisions. A number of district courts had enjoined the collection of such taxes, and the possibility of being forced to refund millions of dollars would not only drastically affect the economy of the country but also possibly bankrupt the national treasury. Hence, the Congress found it imperative to include the provision in the re-enactment concerning legalization and ratification of prior milk orders.

Moreover, this entire matter was carefully explained by Congress in the pertinent Committee reports and for the very reason of precluding the misconstrual concerning re-enactment of the statute that forms the basis of the Secretary's argument. The Congress was also concerned with the possibility that the *entire program* of marketing agreements and orders, as distinguished from the production controls and processing tax of the initial statute, would also be regarded by lower courts as invalidated under the Supreme Court's ruling in *United States v. Butler*, 297 U.S. 1 (1936). It did not want farmers to be injured by the delay attendant to a review of such decisions by the Supreme

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[85] (cont'd) economist Stuart Johnson at pp. 19e-25e which indicates that such restrictive measures may also result in the lowering of health standards within the protected supply area.

Court, and it did not wish them or the AAA to be faced with the necessity of reissuing all milk orders. Therefore, it re-enacted this part of the initial legislation, but the Congress was also concerned that such re-enactment might be construed as Congressional invalidation or doubt concerning agreements and orders issued theretofore, a fact which is specifically stated in the introductory sentence of Sec. 672. Hence, the Congress inserted Sec. 672 into the Act to preclude "technical abatements", and this did not constitute approval of every administrative action under the prior statute or authorize the incorporation of such provisions in future orders. Nor did the Congress intend thereby to legalize illegality or usurp the function of the judiciary. The Congressional intent and purpose is as clear in respect to Sec. 672 as it is to the remainder of the carefully drawn statute, and the reason for such re-enactment is shown by the statements of the Congress in *H.R. Rep. No. 468,* 75th Cong., 1st Sess. 2, and *Sen. Rep. No. 565,* 75th Cong., 1st Sess. 2, 3 (1937), as well as by the limiting language used in Sec. 672(b). A contention that Congress ratified and legalized the invalid base-rating plan of the 1936 Boston order under which nearby producers were given a Class I price for their milk and the other producers the surplus is too lacking in substance to require extended discussion, not only because this would violate the Act of 1937 but also because the 1965 amendment clearly indicates that Congress did not intend any such inconsistency.

Even the lower court in *Green Valley, supra,* recognized the inapplicability of the ratification argument in respect to the 1937 Greater Boston milk order, noting that the milk order had been issued subsequent to the 1937 re-enactment of the Act. This matter is laid to rest by the Supreme Court, however, for it specifically rejected such argument in *Brannan v. Stark,* 342 U.S. at 465-66.:

"Approval of the payments by Congress cannot be inferred from its ratification, upon passage of the Agricultural Marketing Agreement Act of 1937, of marketing orders previously issued under the Agricultural Adjustment Act."

Moreover, the current Order and differential provision was not promulgated until 1964 and requires the payment of over $3 million per year by respondents' class of about 6600 dairy farmers. The base-rating plan to which petitioners refer embraced less than 5 percent of the 15,000 producers then serving the Boston market, the total and individual payments or loss being much less at that time. (A. 240, 431, 438, 451, 458, 633, 312).

As the court below correctly noted, the nearby differential issued on August 1, 1937, did not require *delivery* to the marketing area as did the preferential and illegal base-rating provisions of the 1936 Boston Order. Hence, the 1936 Order provisions were even different in that respect and may not be equated with the nearby differential issued after the re-enactment of the Act. Further, such 1936 preferential price treatment and 1937 differential were not issued *under* the Act as required by the statute in order to be legalized and ratified thereby. In view of the illegible printing of the pertinent Congressional Reports set forth in the appendix and designated by respondents (A. 705, 708), the respondents find it necessary to set forth at least one excerpt from one of said Reports in order that it may be read by the Court:[86]

"NECESSITY FOR RE-ENACTMENT OF THE MARKETING AGREEMENT AND ORDER PROVISIONS.

Certain District Courts have interpreted the Hoosac Mills decision, which invalidated the processing tax

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[86] We note that the excerpts in the brief of petitioners Zuber et al. that allegedly support their position is legible.

"and production control provisions of the Agricultural Adjustment Act, as also rendering the marketing agreement and order provisions of the Act invalid. * * * While to date the question of the constitutionality of such regulation of interstate commerce has not been considered by the Supreme Court, the interpretation placed upon Hoosac Mills decision by certain lower courts has rendered such programs temporarily ineffective in the districts to which such decisions apply; because these courts maintained that the Hoosac Mills decision invalidated the entire Act, including this type of regulation in spite of the fact that the present Act contains a separability provision. The immediate re-enactment of the marketing agreement and order provisions of the Agricultural Adjustment Act would remove the technical basis upon which such adverse decisions rest and enable producers to receive the benefits of such programs without the necessity of waiting until these cases have been finally acted upon by the Supreme Court."

Although petitioners cite the cases set forth in the Congressional report and relied on in the *Cranston* case in respect to ratification and legalization of the nearby differential, it is abvious that those cases are not applicable when a particular provision did not exist prior to the 1937 re-enactment or was clearly illegal and contrary to the Congressional statute. The Secretary himself has terminated various order provisions that existed prior to 1937 because they did not comply with the Act, and he is is obligated by the statute to terminate an order provision when it no longer tends to effectuate the purpose of the Act. It would be a strange situation if the Secretary was obliged by Congressional mandate to follow an invalid provision that frustrated the very purpose and policy of

the Act. It would also be a strange situation if the Congress was obliged to rush through a clarifying amendment every time a witness testifying before a Congressional committee enunciated some erroneous conception of the law.

Respondents note that the Cranston court also relied on the testimony of attorney Reuben Hall that he "drafted" this provision of the 1937 Act, but the following correspondence in 1937 between attorney Hall and a USDA official appears to contradict his own testimony in the *Cranston* case concerning the purpose and effect of Section 672 of the 1937 Act and evidences that he was unaware of the effect of the provision that he allegedly drafted:

* * *

HARDY, HALL & IDDINGS
COUNSELLORS AT LAW
75 FEDERAL STREET
BOSTON

TELEPHONE
LIBERTY 5797

May 10, 1937

Joseph Blandi, Esquire
Solicitor's Office, Department of Agriculture
Washington, D.C.

Dear Mr. Blandi:

I would appreciate having you send me a copy of the Bill now pending before the Senate Agricultural Committee pertaining to the proposed amendments to the Agricultural Adjustment Act respecting Marketing Agreements and Orders.

Question has been presented to me as to whether, assuming that these proposed amendments are enacted into law, the present Order No. 4 covering the Boston Market, could be revived without the necessity for a new application under the new amendments to the A.A.A.

As I understand the situation, Order No. 4 was suspended about August 1, 1936 following the decision

of Judge Brewster in the Buttrick case. If the proposed amendments become law, can the order of suspension be revoked and the order be made effective without a new application and the other formalities attendant thereon?

I would appreciate your giving this matter some study and giving me the benefit of your views with respect thereto.

Very truly yours,

/s/ Reuben Hall

* * * *

RECEIVED: May 13, 1937

* * * * * * *

JB:MM:fe
5–18–37

Reuben Hall, Esquire,
76 Federal Street,
Boston, Massachusetts.

Dear Mr. Hall:

Mr. Blandi referred to me your letter to him, dated May 10, 1937, in which you inquire regarding the possibility of reviving Boston Milk Order No. 4, if and when the amendments to the Agricultural Adjustment Act now pending in Congress are passed.

It is my understanding that a statute which is reenacted and amended may be construed as a continuation of the original statute unless the amendments make substantial changes in the act. In my opinion, the proposed changes in the Agricultural Adjustment Act, insofar as it pertains to milk orders, are so substantial as to prevent revival of Order No. 4.

Very truly yours,

/s/ E. W. Gaumnitz,
E. W. Gaumnitz,
Chief, Dairy Section.

B. THE NEARBY DIFFERENTIAL CONSTITUTES AN ILLEGAL DISCRIMINATION AGAINST NON-NEARBY PRODUCERS AND VIOLATES THEIR CONSTITUTIONAL RIGHTS.

Much of the foregoing reflects that the operation of the nearby differential constitutes an illegal discrimination against the respondents' class, and petitioners have been totally unable to suggest any valid justification for the differential or for the payment thereof by the respondent rather than by handlers. The Secretary has disaffirmed the nebulous claims of "inherent" or extra value of nearby milk and payment for the same by fellow producers. He has rejected cost of production and other like factors as an authorized basis for a nearby differential to a minority of producers. The record discloses that nearby producers had to dispose of their milk for manufacturing use and that handlers are unwilling to pay any premium for milk of the same quality at the same location. If we go back prior to regulation, we find that conditions were such that virtually all farmers were receiving a price that equaled or fell below that of surplus or manufactured milk, due to the excess of supply over demand for fluid milk and the operation of the basic laws of economics in this regard. (28 Fed. Reg. 11957). *Not only is there no basis for differentiation between producers, but the discrimination is compounded by forcing respondents to provide the monies for the discriminatory price preference.* There is no reason for distinguishing the milk of respondents, either by the handler or the consumer, and it is an impossibility when the milk is intermingled and sold with the nearby milk. Clearly then, the nearby differential rests upon the identity of the producers, as determined by farm location, and a price preference on such a basis for an identical product is illegally discriminatory and violative of the petitioners' constitutional rights to equal protection of law

and due process of law.[86a] The Secretary has no authority or right to take the property of the respondents and give it to nearby farmers, and the latter have no right of any nature to either claim or receive the same, these principles being so clear and basic that argument to the contrary would outrage not only the Constitution and a host of cases but constitute an unbelievable affront to right and reason.

The extent of the discrimination is even more apparent when one considers that the nearby producer also receives a zone differential of 47 cents per cwt. over the uniform price announced for the base or middle zone of the milkshed, designated as 201-210 miles from Boston, no zone differential being payable for milk delivered at such base or middle zone.

Respondents again say that petitioners are not representative of the class of nearby producers, but merely of the few in any program who seek favored treatment at the expense of those who automatically assume that fair play and impartiality – as well as legality – will prevail under any government sponsored program. The regulations are complicated and beyond the understanding of the average dairy farmer, who must therefore rely upon his Government and his cooperative association representatives to protect his interests in a fair and decent manner. The deductions for the nearby differential payments do not show on the producers' monthly milk checks, and few dairy farmers in non-nearby areas were even aware

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86a See *Railway Express v. New York*, 336 U.S. 106, 112 (1949); *Pfeiffer Brewing Co. v. Bowles*, 146 F.2d 1006 (1945), *cert. denied* 324 U.S. 865; *Hawaii Brewing Corp. v. Bowles*, 148 F.2d 846, and on the principles enunciated in *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Mayflower Farms v. Ten Eyck*, 297 U.S. 266 (1936); *Yick Ho v. Hopkins*, 118 U.S. 356; *Maxwell v. Best*, 311 U.S. 454.

of their existence. They have little opportunity to protect themselves from such discriminatory devices under such circumstances, *Stark v. Wickard,* 321 U.S. 559, 569-70, and the Secretary's responsibility and duty to administer the law impartially is commensurately increased for that very reason. When he appears to have failed that trust, the courts have that same duty and must "jealously scrutinize" any charge that the Secretary has diverted a part of the required uniform price from respondents and their class. *Brannan v. Stark,* 87 App. D.C. 388, 185 F.2d 871; *Blair v. Freeman,* 370 F.2d 229 (1966).

The petitioners' citations of selective excerpts from the *Rock Royal* decision provide no support for their contentions, and *there were no producers before the Court in that case.* As in the *Hood* case decided the same day, the Court there upheld the marketwide pooling of milk over the objections of handlers who claimed that the pooling provisions were discriminatory and violative of their constitutional rights under the Fifth and Fourteenth Amendments because they were required to pay the excess over and above the marketwide blend price to the pool or settlement fund for distribution to the producers who served competing handlers. The involved handlers maintained that they should be able to pay such excess over the marketwide price to their own producers rather than into the equalization pool, and it is apparent that the petitioners are making the identical claim in contending that their handler may withhold the nearby differential in making payment to the pool in order to pay his producers the nearby differential. The *Rock Royal* case is thus clear authority for the respondents rather than for the petitioners who attempt to rewrite the Court's decision by substituting the government's brief in *Rock Royal* for this Court's decision. The respondents may not be saddled with the inaccurate and miscited excerpts from

an adverse party's brief that presumes to replace this Court's decision, and this is particularly true when the petitioners have sought to evade the clear admissions made in their *Blair* briefs concerning the similar findings and identical purpose and effect of this nearby differential with that ruled illegal in the *Blair* case.[87]

In *Rock Royal*, this Court stated that, "The results of the use of the device of an *equalization* pool is that *each producer*, dealing with a proprietary handler, gets a *uniform* or weighted average price for his milk, with differentials for quality, location, or other *usual* market variations *irrespective of the manner of its use.*"[88] (Emphasis supplied. In commenting on the handlers' objections to the equalization pool, the Court noted that "this argument assumes the validity of price regulation, as such, but denies the constitutionality of the pooling arrangements *because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk*, but must distribute the surplus to others whose milk was resold less advantagously." The petitioners Zuber, *et al.*, understandably omit this language that immediately precedes the quotation set forth at page 35 of their brief, and they also fail to note that this Court distinguished other pooling cases which were violative of due process "because the burdens . . were not equalized with the benefits."

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87 We note, however, that the briefs of the parties in the *Cranston* district court were as unavailable and private as the record in that selective proceeding.

88 This identical language was used by the Court below in the *Blair* decision in referring to adjustments to the uniform price but petitioners overlook such fact in contending that the lower court failed to note this Court's phraseology. They also overlook the fact that *Rock Royal* referred to *usual* differentials and not to a differential that exists in but one other order out of about 75 in the United States.

As previously stated, the differential of the old New York Order involved in *Rock Royal* required *delivery* of milk within a designated area, and part of the differential was paid by handlers[89] and the balance from out of the pool. Although the Court did not find it necessary to analyze the differential from the standpoint of producers because only handlers were before the Court and they had no standing to question disbursements from out of the pool, the Court did state as follows in holding that the differential was not discriminatory against handlers but authorized under Subsection 8c(5)(A) pertaining to payments by handlers: "This was found discriminatory *as between producers* by the District Court but there was no finding or conclusion of law as to any discrimination against *defendants.*"

The defendants in *Rock Royal* were all handlers, both proprietary and cooperative, and this Court reiterated the said finding of the district court in *Rock Royal* where it rejected the argument of a cooperative handler, Central Cooperative, that a cooperative, unlike a proprietary handler, is not required to pay its excess sales over the uniform blended price into the equalization pool or fund but may pay its members on the basis of the use made of their milk: "If the cooperative members were freed of the burden of carrying their proportion of milk going to manufacturing use, *the discrimination in their favor would be the most strongly marked.*" Additionally, the Court refused to prefer certain producers in this regard by differentiating between different types of cooperatives after noting that neither the reports on the bill or the debates in Congress show any effort to

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[89] This part of the New York differential was the market differential paid for the direct-delivery of milk to a city market.

differentiate: "The statutory provisions for equalization of the burdens of surplus *would be rendered nugatory* by the exception of "agency" cooperatives." (Emphasis supplied; see pages 579-80).

In view of the foregoing, it is difficult to perceive any logic or rationality, or the benefits that would accrue, in petitioners' footnoted attempt[90] to rewrite the *Rock Royal* opinion to conform to their contention that a cooperative is not to be regarded a handler but as a group of producers. The petitioners apparently miss the point of the Court's decision and the entire Act in failing to understand that handlers are regulated under the Orders for the benefit of *all* producers. Plainly, the petitioners may not equate producers with handlers in order to transform Subsection 8c(5)(B) into 8c(5)(A) which would authorize a handler, rather than a producer, to pay a differential for delivery of milk within a certain area. Although respondents have no objection to handlers paying any appropriate differential to nearby producers, there clearly is no authorization for the payment of a nearby differential to nearby producers by the respondents under Subsection 8c(5)(B) and least of all on the basis of the use made of nearby milk. This contention for differentiation among producers and exemption of nearby producers from equalization and marketwide pooling would nullify the primary purpose of the Act and such type pooling.

The petitioners further attempt to exempt cooperative associations from the definition of handlers is not only contrary to the Act and Orders but the very opposite of this Court's holding in the *Rock Royal*

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90 *Zuber* brief, page 55, ft. 92.

case,[91] and petitioners also overlook the fact that such cooperative handlers were refusing to comply with the Act and Order in *Rock Royal.* The respondents respectfully submit that *Rock Royal simply points* up the discrimination against non-nearby producers and that it is by no stretch of the imagination authority in support of the petitioners. Their resort to outmoded arguments, such as that a range of mountains prevented delivery by non-nearby producers,[92] is simply illustrative of the lack of any rational basis for defending the discriminatory nearby differential in fact or in law.

The case of *Secy. of Agric. v. Central Roig Co.,* 70 S.Ct. 403 has no applicability here.[93] That case involved a different statute which authorized a quota system on a historical basis. This Act circumscribes the power of the Secretary and provides for the entry of new producers into a market, assignment of "bases" according to current marketings, and other provisions of similar nature. Respondents do not claim that the Act is discriminatory but only that the Order provision is illegally discriminatory on the principle enunciated in *Baldwin v. Seelig,* 294 U.S. 511, a case that was specifically referred to in the Congressional Reports relating to the 1935 Act.

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91 "Each defendant is a dealer handling milk moving in interstate commerce (p. 540)... A handler is a person engaged in the handling of milk or cream received at an approved plant for similar sale. 'Handler' includes cooperative associations. (p. 554)... The Government makes the point that none of the defendants, all handlers, can object to the terms of the Order. (p. 560)... Whether cooperative or not, the defendant corporations have no interest in the producer settlement fund. (p. 561)... The administrative construction has been to include such cooperatives as handlers. With this we agree. (580)."

92 See testimony of Dr. John D. Black, author of *The Dairy Industry and the AAA* (extensively cited by petitioners), during administrative hearings for the N.Y.-N.J. Order at pp. 4455-58 concerning rail shipments of milk from south of Canadian border in 1909 to New York City.

93 See *Fleming v. Moberly Milk Products Co.,* 82 U.S. App. D.C. 16. 160 F.2d 259 *cert. dismissed* 331 U.S. 786.

C. THE SECRETARY'S FINDINGS ARE DEFICIENT AND INCONSISTENT AND UNSUPPORTED BY VALID AND SUBSTANTIAL EVIDENCE, AND HIS CONCLUSIONS AND DECISIONS ARE IRRATIONAL, INCONSISTENT AND ARBITRARY

The Secretary has found in each of his decisions promulgating a nearby differential, including that for the N.Y.-N.J. and Connecticut Orders, that the nearby producers were losing their markets to non-nearby producers; that much of the nearby milk had to be disposed of for manufacturing use, and that federal regulation and a marketwide pool were necessary to give the nearby producer an opportunity to retain his market on an equal basis with out-of-state producers. He has found that the nearby producer receives a protected market and a higher Class I price than he would in the absence of regulation, and the record discloses not only repeated admissions in this regard but that nearby producers admitted in 1937 prior to issuance of the first nearby differential that their prices were higher by 64 cents per cwt. under Federal regulation. These findings are totally inconsistent with his findings that nearby producers have always been able to get a higher price for their milk, that the nearby producer has always been able to dispose of his milk for fluid use at Class I prices because of his proximity to fluid consumption centers, and that such "historical price relationship by location" justifies the issuance of a discriminatory differential. Although respondents supply the great bulk of the fluid milk market, he has inconsistently forced them to pay $3 million per year to nearby producers because of the fluid use of the latter's milk. He has found that handlers would not pay nearby producers a premium of 7 cents per cwt. for their milk, and that handlers preferred to purchase their milk from non-nearby producers because the handlers could save such amount

under the zone differential that exceeded actual costs to the handler by 7 cents prior to 1964:

> " . . . city plant operators often have preferred to purchase milk from country sources rather than from local producers. The situation is, in fact, one of the major marketing problems dealt with in this decision because recently much of the locally produced milk has had to be disposed of in manufacturing channels." 29 FR 11208.

In spite of the foregoing, he has promulgated a differential awarding an extra payment of 46 and 23 cents to nearby producers, payable by non-nearby producers, and he has inconsistently and irrationally referred to the comparative value of nearby and non-nearby milk without ever specifying any value for nearby milk except that pertaining to illegal fluid use considerations. Moreover, he has constantly referred to "historical" values in obvious recognition of the lack of any current basis for the nearby differential, and he has repeatedly ignored the factor of direct-delivery of milk and resultant savings in handling costs in finding that the nearby producer historically received a higher price for his milk over and above transportation costs. He has illogically found that a nearby differential was appropriate in certain markets and orders because the Boston Order contained a nearby differential. He has found that the factors of "availability" and "inherent value" of nearby milk should be compensated by handlers and not producers, and that it was inappropriate to reward evenness of production on a group basis because of individual variations within every section of the milkshed. All of these findings are inconsistent with the awarding of a price preference to nearby producers through the differential provision of the Order, and the Secretary has even admitted that the awarding of such a differential is contrary to and inconsistent with marketwide equalization pooling of milk. He has found that varying

prices among producers were responsible for the disorderly marketing conditions that brought about the need for federal regulation and consolidation of the present Order. He has found that nearby producers under such secondary markets depended upon the non-nearby Boston producers to assure them of an adequate reserve and that this was one of the reasons for higher prices in the secondary markets where the fluid milk utilization rate was higher because of such failure to share the burden of surplus associated with the secondary markets. He has found that allocation programs of State milk control boards were responsible for the "higher" prices to nearby producers and that such programs could not assure a market for nearby milk. Nevertheless, he has persistently referred to the higher prices of nearby producers without recognizing such fact or his admissions that all milk would be priced at surplus in an unregulated market if the stability of an adjacent federal order was not present. He recognized that over 60 percent of the milk was delivered directly to market in 1964 and promulgated a differential that pertained to non-nearby producers delivering in such manner in 1936, but he illogically dropped such a condition in 1937 in order to award a prohibited subsidy to nearby producers based upon the location of their farms. He has continued the Connecticut nearby differential which causes the intermediate nearby producers to sustain a loss of 17 cents instead of a gain of 23 cents because of the fluid use of their milk and the higher prices received by them prior to federal regulation. He has continued that differential when it costs the non-nearby producer 44 cents in order to market his milk and when the nearby producer is benefitted by but one or two cents by the Connecticut differential, although he has admitted that prices to Connecticut producers would be about the same in the absence of a differential. He has designated national thruways as "historical" boundaries and thereby caused producers on one side of the highway to be "nearby"

producers and those on the other side who are served by the same pick-up truck to be "non-nearby" producers. The respondents respectfully submit that these and other findings and conclusions of the Secretary are totally inconsistent, irrational and arbitrary.

Further, as the Court below correctly noted, every witness in the administrative hearings justified the nearby differential on the illegal basis of the fluid use of nearby milk, and the economists for nearby-dominated associations could not even suggest any current basis for the nearby differential's existence.

If a differential of this nature has no current validity and must therefore be justified on a "historical" basis, it is evident that no amount of evidence could result in its elimination through administrative proceedings. Indeed, this is the very reason why the present action was instituted. Furthermore, the Secretary found in 1964 that although "considerable testimony in support of removal of the provisions was received, it was not established that the farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the orders at this time." This finding is totally deficient, for the Secretary is required to find that all of the terms and conditions will tend to effectuate the declared policy of the Act to establish orderly marketing conditions. Many things might not result in unstable or disruptive marketing conditions, but this does not warrant their insertion into the order under the finding that must be made by the Secretary. Moreover, it is difficult to comprehend why it is so difficult to enumerate the specific reasons for the differential, other than to refer to "somewhat higher values" or "for whatever reasons" in discussing the basis for its existence, since it does not appear to be at all plausible that the reasons for the differential could be so nebulous if the payment of it by handlers was so prevalent and "customary."

It should also be noted that the Secretary acknowledged in his 1957 New York Decision that "a history of paying nearby differentials has merit only if the historical basis for such differentials is found to be sound". In view of the lack of certainty concerning the basis for such differential and the acknowledgment that the factors that were initially suggested for its issuance are not applicable today, it is submitted that there is no justification for the differential on this basis. Indeed, the Secretary stated in his brief filed in the 1937 Boston Order hearings that "the history of the Boston milkshed has shown that no group of producers can be kept from participating in the fluid milk market." (A. 672). The reason for the differential has disappeared, if in fact it ever existed, but the differential remains. This is irrational, inconsistent and arbitrary action by the Secretary. Moreover, many producers who presently receive the nearby differential never received a higher price for their milk, and many producers in non-nearby areas who formerly received such "historically higher-price" because of a fluid outlet for their milk are not eligible for the differential. Even the "history" is inconsistently applied by the Secretary. (A. 609, 696-99).

The respondents not only contend that the Secretary may not consider the use to which a producer's milk is put, historically or potentially, in promulgating the nearby differential and thereby apportioning the fluid milk market to nearby producers, but that the very statistics upon which such findings and conclusions rest are also invalid "evidence" because they relate to the use of milk of a producer or group of producers. In view of the invalidity of the Secretary's findings, there is no reason to review such "evidence", and it should be noted that the price statistics compiled under artificial Federal regulation[94] or preferential State programs are also incompetent as evidence.

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[94] Both petitioners make reference to the Phildelphia (Delaware Valley) Order in this connection but neglect to mention that individual-

(cont'd)

Moreover, we note in examining the administrative record of the 1937 hearings for the Greater Boston Order that John Carten, spokesman for the Nearby Producers Association, purported to justify his demand for an illegal tax on the basis of threats to disrupt the market[95] and the alleged price paid to but *one* producer out of approximately 20,000 supplying the market at that time:

> "MR. CARTEN: . . . we have figures here from *one* of our producers from 1920 to 1930 for the price received for milk shipped to Salem, Massachusetts, to the H.P. Hood Company and they averaged – it is hard to average them exactly,

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[94] (cont'd) handler pooling was replaced in that Order because of the disorderly marketings and price-cutting resulting from varying prices. Over 90% of the Philadelphia Order producers voted for a marketwide pool, and the prices received in that market were lower than in adjoining markets because of the chaotic conditions and toll taken by the varying prices and resulant self-defeating competition. (31 F.R. 15670). That Order is presently being considered for merger with two adjoining orders.

[95] "MR. CARTEN: * * * and the local producers, – there is always a row in the market unless they are compensated in some way." (A. 269); " * * * most of us are in a position to retail milk with the added confusion to the market caused by a large number of small distributors trying to squeeze into Class I sales * * *" (A. 280); "* * * we might be tempted to sell to local dealers not complying with the license." (A. 280). The brief of the Nearby Producers Association stated that unless they received the 46¢ per cwt. instead of 36¢ per cwt., they "will swarm to the Office of the Market Administrator to remind him of it and demand an adjustment." (A. 687). Charles E. Shepard, President of the Federated Dairy Association of Massachusetts testified in the 1935 hearings for the 1936 Boston Order that one of the reasons for giving a preference to nearby producers was their intention of "becoming a menace to the enforcement of the agreement." (A. 675).

> because in all cases the butterfat wasn't given, but it was between – somewhere between $1.20 and $1.30 over the NEMPA price in the 191-mile zone. We should have at least a cent a quart over the equalized price to be protected. That would be 46¢ instead of 36¢ wouldn't it, Mr. Alpin?" (A. 266, 283-85).

W. A. Bronson, economist for the NEMPA, testified in favor of the nearby differential in the 1937 hearing and referred to prices allegedly paid to a few producers delivering to but two of the many handlers in the Boston market. (A. 263, 687). His figures were admittedly subect to correction, related to *direct-delivered* milk (277-78), and conflicted with prices submitted in a nearby brief (A. 299) for two producers who delivered to one of the handlers mentioned by Mr. Bronson. Moreover, this witness admitted that nearby producers had received $3.10 per cwt. under the 1936 Boston Order and only $2.46, or 64 cents less, during the period in 1936-37 when the Order was suspended. (A. 264). He testified as to the *necessity* of a Federal order for nearby producers and also stated that, "There appears to be no question that *based upon past history* a Federal Order can give the Massachusetts producers more money for their milk than a Milk Control Board Order without assistance from the Federal Government * * * ." (A. 264-65).

The limited price figures cited by Mr. Carten and Mr. Bronson were without any real supporting foundation, in that the identity of the few producers involved was not furnished nor was there any explanation of the effect on such alleged prices of butterfat content, transportation, rebates, kickbacks to handlers, etc. Mr. Bronson had testified in the December 10-12, 1935, hearings that handlers who are able to dispose of their milk for fluid use force producers to give rebates, etc. (A. 674-75), and

the price figures were presented primarily in the briefs and not subject to cross-examination. Significantly, the Market Administrator himself admitted during the 1936 Order hearings that, " * * * we have to confess to you that there is no one who has any accurate figure computed on just how much more these Massachusetts producers should receive for their milk. (A. 244) * * * It is different from what they have demanded. They have demanded, through their representative, that every drop of milk they make should be paid for at the Class I price." (A. 245).

Although a study had purportedly been conducted prior to this time in respect to the differences in prices received by nearby producers from 1926 to 1934, it is clear that such statistics are irrelevant as well as inaccurate and illegal for reasons heretofore related. It has also been noted that both the AAA and the Department of Justice acknowledged that many producers did not receive bases under the licenses and that the blended price had been computed on the basis of conjecture because of incomplete price information, a fact that would eliminate the price figures for the period when the licenses were in existence and further reflect on the accuracy on the alleged price study. Indeed, the official of the USDA who testified in the *Cranston* case that he had conducted the study[96] for the Boston market in 1934 was involved in the capitulation of the AAA to the nearby producers and the Massachusetts Milk Control Board, and it is elementary that some plausible justification for such a concession would have to be presented after the passage of of the 1935 Act which spelled out the necessity for equalization and the illegality of such price preferences that

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[96] No study was produced or offered in evidence in the *Cranston* case in spite of such testimony. But see A. 628-29, including footnote 8.

burdened interstate commerce under the revised language of the 1935 legislation. Moreover, that witness made the following obviously contradictory statement during the 1937 Boston Order hearings:

> "MR. ALPIN: You have heard the testimony here that these producer associations have nothing to say about the price of milk. When we were operating in Boston we were continually told by the dealers, the large dealers, that they had to own their milk as cheap as their competitors, and that they intended to own their milk as cheap as their competitors. That being their policy, and *it has been their policy for years,* and they admitted under their testimony yesterday that the dealer sets the price and the producers have nothing to say about it. I think that you have very little assurance as to what the price will be without a Federal order . . ." (A. 683).[97]

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97 The testimony of this witness in *Cranston* did not include any mention of the supposedly temporary concession to the Massachusetts Milk Control Board as the main reason for the awarding of the higher bases and Class I prices to nearby producers under the licenses. Nor did he refer to the fact that the nearby producers' monopoly over the fluid milk markets disappeared with the advent of tank trucks, refrigeration, etc. In fact, this witness affirmatively stated that the market differential defined in the Congressional Reports never existed in secondary markets in attempting to discredit the Congressional definition and replace it with that proffered by petitioners. Of course, such Congressionally defined market differential existed both prior and subsequent to federal regulation in the Troy and Albany, N.Y., area in which the witness testified and it was paid in virtually all secondary markets in New England as well.

Findings without supporting and legal evidence are arbitrary and baseless, and it is clear that the findings made in promulgating the nearby differential of the 1937 Boston Order and the present differential of the Massachusetts-Rhode Island milk order were by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation as an arbitrary exercise of power and violation of due process. *I.C.C. v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913). None of the other 75 milk orders except the Connecticut Order contains such an illegal and discriminatory differential, and it is as "vital" to orderly marketing as a racist poll tax is to good government. Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. It is also basic that an administrative order may not be upheld unless the ground upon which the agency acted in exercising its powers are those upon which its action can be sustained. *SEC v. Chenery Corp.*, 332 U.S. 194, 318, U.S. 80.[98]

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[98] An extremely clear and informative article concerning the proper role of the administrative process and the courts by Dean Robert Kramer, George Washington University Law School, former Asst. Atty. General, appears in *The George Washington University Magazine*, Fall 1965, and is entitled *The Administrative Process and the Courts*. See also *Parker v. Lester*, 112 F. Supp. 433; *Phillips v. Fidalgo Island Packing Co.*, 230 F.2d 638; *Sunshine Dairy v. Peterson*, 193 P.2d 543, 560; *Skinner-Eddy Corp. v. United States*, 249 U.S. 557; *Varney v. Warehime*, 147 F.2d 238; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254; *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 283; *Union Producing Co. v. FPC*, 127 F.Supp. 88.

D. THERE IS NO PROPER BASIS OR PURPOSE FOR REMAND OF ANY NATURE

1. Summary Judgment Was Proper In This Case

The Secretary's brief does not even raise the question of remand and the petitioners Zuber, *et al.*, have totally failed to even suggest a proper basis or purpose for any type of remand. The latter actually have no standing in law or fact to question the record below or the adequacy of representation in the District Court because (1) they were given repeated opportunities to present any claim or defense to the District Court over a period of six months (A. 111, 125, 657-58); (2) they submitted a brief *amicus curiae* in the name of the Commonwealth of Massachusetts which set forth all of their claims and defenses (A. 125, 732); (3) the District Court fully considered their arguments and those of all applicants for intervention (A. 121, 124-25, 127); (4) they worked hand in glove with the government from the very beginning of the case and actually dominated the government's strategy (A. 36, 37, 58); and (5) they represented to the Court of Appeals that they chose to abandon their appeal concerning denial of intervention in order to intervene for the sole purpose of prosecuting an appeal from the judgment of the District Court (A. 129-31).

Nevertheless, they attempt to have the better part of two worlds at respondents' expense by pursuing an appeal concerning denial of intervention which they voluntarily abandoned in the lower court because they did not believe it would succeed. (A. 130).[99] That issue is not

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[99] The identical tactic was employed in respect to the modification of the preliminary injunction which allowed nearby producers (cont'd)

properly before this Court and said petitioners may not justify a specific misrepresentation to the Court of Appeals and a violation of its Order by claiming that it committed "egregious error" after they accepted the benefits of said Order and refused to test such alleged Order at the proper time and in an appropriate manner.[100]

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[99] (cont'd) to obtain their monies from the escrow fund and a full uniform price without escrowing of the part of the nearby differential attributable to their marketings of milk. Although it was the specific understanding of all counsel that the non-nearby producers would receive their escrowed monies if they prevailed in the case, the petitioners now maintain that the nearby producers are entitled to all of the non-nearby producers' escrowed monies even if the nearby differential is illegal.

[100] Nor do respondents believe that petitioners may nullify or justify persistent improprieties by referring to "acrimonious and intemperate correspondence, copies of which have been directed to the Clerk of this Court". (Zuber brief, p. 83). Petitioners not only initiated such practice but also forced respondents to reply thereto if they were not to be regarded as admitting the various misstatements therein. Respondents also repeatedly requested petitioners Zuber, et al., to refrain from such unnecessary practice and could not perceive any proper reason therefor. After certain misstatements in said letters, respondents regrettably found it necessary to employ a court reporter to record a conference between counsel concerning preparation of the joint appendix and the identity of the issues before this Court in order to prevent further misstatements concerning such matters. The Court is urged to examine the transcript of said conference, presently filed in the District Court, in which petitioners Zuber, *et al.*, repeatedly evaded answering two simple questions concerning whether petitioners regarded the abandoned appeals of Zuber, *et al.*, and that of the NEMPA and the CMPA to be within the issues before this Court. Respondents did not designate any material relative thereto because they were informed after said conference that petitioners did not intend to argue such matters because they were not properly before this Court.

Moreover, the attack of petitioners Zuber, *et al.*, on the record below is totally lacking in merit. Although petitioners maintain that all of the administrative records were not before the District Court and quote from the government's papers filed on March 20, 1967, both petitioners are fully aware of the fact that said statements were made for the sole purpose of delay because petitioners anticipated an adverse decision from the motion's judge whose term was due to expire in a short time. Significantly, the government's papers were filed two months before the hearing on summary judgment, and neither petitioner filed any additional administrative records after succeeding in delaying the hearing until the expiration of said judge's term in motion's court.

Further, the government counsel, with the approval of counsel for Zuber, *et al.*, informed the District Court on January 11, 1967, over five months before the hearing on summary judgment, that they would file cross-motions for summary judgment on January 27, 1967 (A. 57) and they proposed February 8, 1967 as the hearing date. The Court was advised that the administrative record was no problem at that time, and respondents note that their counsel was able to review all of the administrative records. The same is equally true of the government and of the large law firm that represents Zuber, *et al.*, particularly as they have been involved in the nearby differential litigation since February 1, 1965, and referred at that time in the *Blair* case to the administrative hearings and decisions involved in this present case.

Although the administrative records for the secondary milk orders consolidated into the present Order are not actually necessary for a determination as to the validity of the nearby differential of the consolidated Order, the petitioners are aware of the fact that they chose not to furnish such records to the District Court after the respondents filed and served summaries of said records.

(A. 120, 660-61). Petitioners had six months to produce the records which they initially admitted were readily available within one month, and such records most assuredly would have been produced if they benefited petitioners in any substantial sense or if the respondents' summaries (A. 661-704) of such records were unfactual in any manner. Now, however, petitioners attempt to take advantage of their own carefully conceived omissions by claiming that the material they refused to furnish because it was unnecessary or unfavorable is suddenly and unexplainably transformed into material that should have been before the District Court. This tactic, of course, is also intended to indirectly attack the accuracy of the summaries submitted by respondents, and petitioners Zuber, et al., utilize the same tactic in claiming that respondents refused to consent to the presentation of one secondary administrative record to this Court.[101]

In reaching for another last-straw "argument", the petitioners attempt to convince this Court that the "excerpts"

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101 A similar representation was made by government counsel in *Lewes Dairy v. Freeman,* 260 F. Supp. 921 (1966), concerning the relevancy of records not before the Court. Moreover, the petitioners' real complaint is that they could not produce such unnecessary records at the last minute and misstate their contents. One example of this practice is set forth at page 68 of the appendix wherein government counsel attempts to convince the Court that the present suit should not be authorized as a class action and misrepresents for an immediate purpose that the *Blair* case was not prosecuted as a class action. The same government counsel was fully aware that the government's Statement of Facts as to which there was no dispute and many other papers in *Blair* set forth that said case was a class action. Indeed, government counsel had written to the Blair counsel and suggested adding a couple of additional plaintiffs to better show that it was a class suit.

from the administrative record for the 1964 Order before the District Court denotes a deficiency of some nature. However, every page reference except one that benefitted the petitioners was filed in the District Court, and it would be an obvious disservice to that court to burden it with a 5,000 page record that had no possible bearing on the issues before the court. Moreover, the petitioners fail to inform this Court that the parties "excerpted" the administrative record for the court in the *Cranston* case and that the administrative records for the secondary orders were not filed in that case. Additionally, the administrative records for the Boston licenses and Orders were not filed in that case, and the petitioners' complaints are not only unfactual but without merit.[102]

The additional contentions of Zuber, et al., that all of the matters raised by the respondents were not presented in administrative proceedings is also simply untrue. Indeed, most of such arguments were presented in the 1936 and 1937 administrative hearings and in those for the secondary orders as well. (A. 243, 272-73, 681-82, 684, 685, 691-92, 698). All of the arguments were also presented in the 1963 hearings, and such fact may be illustrated by the testimony of one witness (A. 440) without even referring to the briefs filed in said hearing. Significantly, it was the NEMPA counsel, Reuben Hall, petitioners' associate counsel, who attempted to prevent such testimony concerning the illegal aspect of the nearby differential in the administrative hearings. The nearby differential was one of the main issues at said hearing (A. 644) and every

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102 Respondents note that the plaintiffs' "approved" attorney in *Cranston* admitted that he had not even read the administrative records before the so-called trial in the *Cranston* case, but the government counsel and associate counsel of Zuber's attorneys did not regard such fact to be significant in respect to adequacy of representation of plaintiffs' class in that case.

aspect of such differential was explored at the 1963 hearings as evidenced by the size of the record below.[103]

The petitioners Zuber, et al., also attempt to distinguish the *Blair* case by maintaining that it involved far different and very limited findings by the Secretary not present in his decision regarding the Massachusetts-Rhode Island or predecessor orders." This statement is also inaccurate, and the Court is respectfully requested to compare the findings for all of the main orders that are set forth at pages 17e-18e of the appendix of the brief of respondents in opposition to the brief *amicus curiae* of the State of Connecticut filed in No. 861, October Term, 1968, in connection with the petitions for certiorari. The petitioners presumably make such representation regarding the Secretary's findings in issuing the N.Y.-N.J. nearby differential in order to avoid an inquiry as to why that case was disposed of on cross-motions for summary judgment if it is allegedly inappropriate to dispose of this case in such manner. The Court is respectfully requested to consult the Secretary's decision for the N.Y.-N.J. nearby differential, 22 Fed. Reg. 4212-16, to observe the extensive findings and discussion of the nearby differential by the Secretary.

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103 The petitioners maintain that yet another study should be made of the nearby differential but neglect to inform that this technique has been consistently utilized to avoid the termination of the differential. (A. 316). Moreover, committees of experts of national stature have condemned the nearby differential as an "impediment to intermarket relationships." USDA, *Federal Milk Order Study*, 1962. Contrary to the statements of petitioners, only one member of the committee dissented from this particular part of the Report and he was an economist for the NEMPA who had previously admitted that, "Unless a means can be developed to regulate all the milk on a uniform basis, the price structure will collapse, and local producers will be left without a market." (A. 694).

Petitioners also attempt to distinguish the *Blair* case by maintaining that the entire State of New Jersey was included in the first nearby differential zone under the N.Y.-N.J. Order and that a comparable provision does not exist in the present Order. However, petitioners are well aware of the fact that all of the State of Rhode Island and all of the State of Massachusetts except Berkshire County is included in the first nearby differential zone of the Order involved in this case. Further, those producers more than 40 or 80 miles from Boston were designated as "nearby" producers in 1964 when the said States were classified as "nearby" under the consolidated Order. The nearby differential areas that previously existed under the secondary orders were also expanded at that time to embrace producers whose farms had never been classified as "nearby" under any of the orders, and all of the previous producers classified as nearby producers were regarded as eligible for the differential payments under the Consolidated Order irrespective of where his milk was delivered and regardless of the fact that he might not have a "historical" association with the new markets. (A. 651, 609, 696-97)

The petitioners also maintain that summary judgment was inappropriate because factual questions existed in respect to "the existence of customary trade practices both before and after the passage of the 1935 Amendments", but they fail to advise that this subject was fully covered in the administrative record and that such records disclosed that any differences in price between producers was attributable to the use of their milk for fluid purposes. The "affidavit"of associate counsel Reuben Hall did not carry a notary seal and was obviously unable to raise any genuine issue of fact. The testimony of such witness in *Cranston* can hardly replace the testimony in the 1963 administrative record or constitute evidence relating to the 1936 and 1937 Boston hearing records, and we have previously noted that the testimony of said

witness was not corroborated by any documentary evidence of any nature.

The District Court also gave full consideration to the questions of primary jurisdiction and exhaustion of administrative remedies, and these defenses were raised below for the sole purpose of delay for the reasons aforesaid. The nearby differential challenged by respondents had been promulgated in 1964 and was causing irreparable injury. Only a question of law was involved and the pertinent cases were set forth by respondents in the District Court. (A. 87).

The petitioners also allege that the order for summary judgment was signed by the District Court without change, but they fail to advise that the bulk of said Order consists of prior orders entered by the court in the action and which were prepared by the court. Further, petitioners fail to inform that objections were filed to the Order as well as to all other orders entered by the Court (A. 165, 728). These objections were intentionally filed and made a matter of record by the presiding judge, and his familiarity with every aspect of the proceedings is the real complaint of the petitioners. (A. 150). The respondents agree that a judge should not mechanically sign orders presented by counsel but they maintain that there is no reason for not signing such an order when it has been fully debated and considered by the Court and is in agreement with the facts.

Finally, respondents note that petitioners place heavy reliance on a book written by Dr. John Black entitled *The Dairy Industry And the AAA*, but they fail to note that Dr. Black's book was published just one month after the 1935 Act and that he took no exception to the Congressional definitions of the differentials in setting them forth at page 340 of his book. Moreover, Dr. Black was honest enough to acknowledge during the 1956 administrative hearings for the N.Y.-N.J. Order that he initially

favored the nearby differential for the following reason (R. 4446):

> "Q. And you don't believe that nearby milk has any further value than indicated by that principle?
>
> A. That involves the question of the 40-mile zone which you had up earlier before, and I begged off on answering that one because, frankly, I haven't studied that one in the different markets. I have sat in on the discussions of it when they first set up the Boston milk order. *I had a personal interest in it because it happens that a brother of mine has a dairy farm a few rods short of 40 miles from the State House in Boston.* He gets the 46 cents premium on his milk because he is there. The justification for it in those days may be different from the justification for it now. * * * "

Dr. Black further testified against the "un-American" exclusion of "distant" dairy farmers from sharing in the fluid milk markets; the inability to "defend present arrangements or future arrangements too much on the long distant past"; the failure of the Connecticut market to carry its fair share of surplus because of "the administrators in Washington"; and the fact that nearby milk in non-federal markets would be priced at virtually manufacturing milk prices except for the stabilizing effect of the federal orders in adjacent markets. Dr. Black also rejected the view of some nearby producers that if a particular area does not produce as much milk as it consumes, the prices to producers in that area should be raised high enough to induce the extra production or a large part of it. This policy, detrimental to consumers and the producers, is pursued with governmental approval at the insistence of politically influential groups, and petitioners fail to cite Dr. Black's testimony in 1956 concerning

such an un-American and monopolistic approach which also injures "outside" dairy farmers by the exaction of the subsidy payments:

> "This is of course contrary to the whole conception and principle of free trade among the states upon which our republic was founded. That principle says that all milk of the same quality moving to one market shall sell at the same price delivered in that market, but that the price received for it at the farm will decrease with distance from this market strictly in line with the increase in transport and related handling costs. Furthermore, milk will move to this market from points outward from the market till a point is reached where the milk will net more if shipped to some other market or put to some other use * * * ."

2. There Is No Reason For Remand To The Secretary

The Secretary simply terminated the nearby differential of the N.Y.-N.J. Order after it was declared illegal, and no question was raised concerning the necessity for remand or in respect to the separability of the Order provisions.[104] The District Court fully considered this question (A. 127), and this simply is not the key provision that petitioners claim, a fact that is abundantly clear by

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104 The petitioners cite the percentage of producers in the milkshed that favor federal regulation, not the nearby differential. Producers have never been able to vote on this separate provision, and their votes are cast for them by their cooperative associations on the milk order as a whole. The NEMPA, largest of the associations, votes for many of the non-nearby producers and its counsel favors the nearby differential. Moreover, the district and appellate courts both noted that the Act and Order have separability clauses.

virtue of its existence in but one other milk order and the Secretary's admission that it is not necessary therein. The cases cited by petitioners relating to remand are totally inapplicable to the present situation. The case of *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, involved a situation where a license was issued upon certain conditions by the the FPC, and such conditions were declared invalid by the Court of Appeals. Instead of remanding the case to the FPC for a determination as to whether the license would be issued in the absence of such conditions, the appellate court presumed to decide this question by its own action, a procedure that was doubly incorrect because such conditions were held to be within the power of the agency under the statute. That situation is totally different from the present case, a fact that is evidenced by the Secretary's action in *Blair* in terminating that nearby differential after it had been declared illegal. The absurdity of contending that the nearby differential is a key provision is aptly illustrated by the testimony of a nearby producer in the Cranston case that he made an investment of over $100,000 in sole reliance on receiving a nearby differential that averages $12.50 per month under that Order.

The termination of the nearby differential in *Blair* did not result in any disorderly marketing and, indeed, milk is now delivered to the appropriate market in the most economical manner when the nearby differential is not present to dictate the movement of the milk to an improper market. (A. 601-03, 606, 456-58)

The case of *Addison v. Holly Hill*, 322 U.S. 607, is likewise inapplicable here, except as to its holding that the administrator is not the arbiter of the extent of his own statutory authority and particularly under an Act that details and enumerates his statutory powers. In *Addison*, the court was concerned with the fact that invalidation of a part of the regulation there involved would result in a different meaning being given to the remaining

portion of the regulation that was offensive to the Congressional purpose. In view of this fact and the acknowledged discretion in the administrator to act within statutory bounds by revising the offending definition to effectuate the Congressional purpose, this Court decided that remand for retrospective action was preferable to the mischief of producing a result which was contrary to the statutory design. The same principle was involved in *Morgan v. United States,* 307 U.S. 183, where the Court allowed retroactive administrative action to preclude the awarding of funds collected during the action to those not equitably entitled thereto. There had been no decision on the merits in that case, and the Secretary merely failed to follow the proper procedure in issuing a reduced rate schedule for stockyard patrons. This Court held that the dealers were not entitled to such funds that emanated from patrons, and that the Secretary should have an opportunity to follow the appropriate procedure in effectuating the rate schedule in order that a decision might be had on the merits. That situation is not present here, and the lower court has correctly concluded that the USDA has already demonstrated by its recommended decision and other action that it would disburse respondents' monies to the preferred nearby producers. This procedure would be particularly unfair when it is considered that the Secretary announced that respondents would receive their escrowed monies if the nearby differential was declared illegal:

> "If the finding of the District Court that the farm location differentials are invalid is eventually upheld, the nearby and intermediate producers would receive no money from the escrow fund. It would be distributed pro rata to distant producers on milk received at Massachusetts-Rhode Island pool plants in the months beginning with December 1966, after deduction of any expenses

of the litigation that might be determined as appropriate by the court."[105]

The respondents are of the respectful opinion that the *Morgan* case is authority for the disbursement of the escrowed monies to non-nearby producers, and to like effect are *Brannan v. Stark*, 342 U.S. 451, *Inland Steel Co. v. United States*, 306 U.S. 153, and *Richert Rice Mills v. Fontenot*, 297 U.S. 110. Indeed, the respondents believe that they are entitled in law and equity to the monies awarded to nearby producers by the Court of Appeals under the authority of the aforesaid cases. The granting of the unconscionable demand of petitioners Zuber, et al., for all of the respondents escrowed monies would reward those who propose an illegality and penalize those who rectify it. It would cause virtually every farmer, non-nearby and nearby, to question the workings of the law, for it is an accepted fact among both groups that the escrowed monies would be returned to the non-nearby producers if the differential was ruled illegal. (A. 710)

The respondents maintain that the lower court correctly ruled that the Secretary did not have the statutory power to issue the nearby differential, and the language of the court in *Hood & Sons v. DuMond* is pertinent: "Our system fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation, that no home embargoes will withhold his exports, and no foreign state will by custom duties or regulations exclude them."

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105 Market Administrator's Bulletin for the Mass.-R.I. Milk Marketing Area, July, 1967.

And the words of Justice Cardozo in *Baldwin v. Seelig* seem especially appropriate:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if custom duties, *equal to the price differential,* had been laid upon the thing transported. * * * To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not in division."

The respondents suggest to the Court that the Congress was guided by these same principles of uniformity in enacting the Agricultural Marketing Agreement Act of 1935 and 1937.

CONCLUSION

The judgment of the lower court should be affirmed and the escrow fund distributed in full to the nonnearby producers under the direction of the District Court with costs against the petitioners in any event.

Respectfully submitted,

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